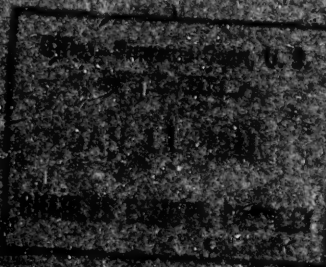


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No. 201

In the Supreme Court of the United States

October Term, 1940

LEON D. PHILLIPS, Respondent, and JOSEPH W. BROWN,
OF THE STATE OF CALIFORNIA, Petitioners,

THE UNITED STATES OF AMERICA, et al.,

Appellants, v. THE UNITED STATES OF AMERICA, et al.,
Respondents.

Writ of Habeas Corpus.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 201

LEON C. PHILLIPS, INDIVIDUALLY AND AS GOVERNOR
OF THE STATE OF OKLAHOMA, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The court below filed no opinion. Its findings of fact and conclusions of law (R. 245-262) are reported in 33 F. Supp. 261.

JURISDICTION

The court below, three judges sitting, entered a preliminary injunction on April 25, 1940 (R. 262-264). The order allowing appeal was filed May 29, 1940 (R. 269-270). Probable jurisdiction was noted October 14, 1940. The jurisdiction of this Court is based upon Section 238 of the Judicial Code as amended.

QUESTIONS PRESENTED

1. Whether the United States has sufficient property interests to maintain the action.

2. Whether the District Court properly enjoined the use of military force by the Governor of Oklahoma which threatened imminent damage to, and probable destruction of, property interests of the United States, when the use of such military force was not in fact directed at the suppression of violence or the maintenance of order.

3. Whether the District Court properly enjoined the further prosecution of a state court proceeding which threatened imminent damage to and probable destruction of property interests of the United States, where the United States was not a party to those proceedings and no remedy was available to it therein.

4. Whether this suit, to enjoin state officials from inflicting damage to and causing probable destruction of property interests of the United States, is a suit against the state.

5. Whether a suit to enjoin state officials from inflicting damage to and causing probable destruction of property interests of the United States, on the ground of the unconstitutionality of the threatened action, is within the jurisdiction of a three-judge court convened under Section 266 of the Judicial Code.

**CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED**

The relevant provisions of the Oklahoma Constitution and statutes, and of the Judicial Code, appear in the Appendix, *infra*, pp. 100-121. The statutes most directly involved are the Grand River Dam Authority Act (Article 4, ch. 70, Okla. Sess. Laws of 1935, as amended) and Sections 265 and 266 of the Judicial Code (28 U. S. C. §§ 379, 380).

STATEMENT

This is an appeal from a preliminary injunction (R. 262-264) entered by the District Court for the Northern District of Oklahoma, sitting as a statutory three-judge court, in an equity action brought by the United States against the appellants, who are officers of the State of Oklahoma, and against the other appellees. The injunction, issued after full hearing (R. 280-400) and on the basis of elaborate findings of fact (R. 245-257), restrained the appellants, *inter alia*, from any interference with the construction or closing of the Grand River Dam, either by the use of military force or by the further prosecution of a state court proceeding to which neither the United States nor any of its officers were parties. The District Court found that both the use of military force and the maintenance of the state court proceeding threatened imminent danger to and probable destruction of the Grand River

Dam, and that both were parts of a plan of appellant Phillips, Governor of the State of Oklahoma, to exact money for Oklahoma from the United States (Fdg. 43, R. 252).

The Grand River Dam is part of a flood-control and hydroelectric power development project which has been wholly financed by the United States (Fdgs. 10-19, R. 246-248). The project has been built by the appellee Grand River Dam Authority (hereinafter called the Authority), an incorporated conservation and reclamation district constituting a governmental agency of the State of Oklahoma. The Authority was created pursuant to the Grand River Dam Authority Act, Article 4, Chapter 70, Oklahoma Session Laws of 1935, as amended.

This Act, among other things, authorizes the Authority to construct the project here in question, to store and impound water, to develop and generate water power and electric energy, and to borrow money and accept grants from the United States or any agency thereof (Section 2 (a) (b), (c)). The Authority is further authorized by the Act to issue negotiable bonds to evidence its indebtedness (Sections 2 (c), 10), but all obligations, whether secured by bonds or otherwise, are payable solely out of the revenues of the project. Section 9 provides:

Any and every indebtedness, liability, or obligation of the District, for the payment of money, however entered into or incurred, and

whether arising from contract, implied contract, or otherwise, shall be payable solely (1) out of the revenues received by the District in respect of its properties subject to any prior lien thereon conferred by any resolution or resolutions theretofore adopted as in this Act provided, authorizing the issuance of bonds or (2), if the Board shall so determine, out of the proceeds of sale by the District of bonds payable solely from such revenues.

The statute also authorizes the execution and delivery by the Authority, to a bank or trust company authorized to accept trusts, of indentures for the benefit of the holders of its bonds (Section 10). It further provides that the trustee under any such indenture may, in the event of default, "by action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such bonds."

On October 16, 1937, the United States, acting by the Federal Emergency Administrator of Public Works, with the approval of the President, made an allotment of \$20,000,000 to the Authority to aid in financing the construction of the Grand River Dam project.¹ The allotment was effectuated

¹ The allotment was made pursuant to Title II of the Act of June 16, 1933, c. 90; 48 Stat. 195, 200, as amended and supplemented by the following statutes: Act of June 19, 1934, c. 648, 48 Stat. 1021, 1055; Joint Resolution of April 8, 1935, c. 48, 49 Stat. 115; Act of June 22, 1936, c. 689, 49 Stat. 1597, 1608; Joint Resolution of June 29, 1937, c. 401, 50 Stat. 352, 357; Joint Resolution of June 21, 1938, c. 554, 52 Stat. 809.

by a formal written offer accepted by the Authority (R. 148-153). The resultant contract (hereinafter called the loan and grant agreement), as modified by subsequent waivers, obligated the Authority to complete the project, including the dam to an elevation of 755 feet, not later than March 30, 1940 (Fdgs. 12, 13, R. 247; Govt. Exhs. 2, 3, R. 402, 100-153).

Pursuant to its obligation under the loan and grant agreement, the United States has purchased and now owns \$11,563,000 aggregate principal amount of the bonds of the Authority, together with attached coupons. This represents all of the outstanding bonds and coupons issued (Fdgs. 14, 15, R. 247). They were issued under an indenture of trust dated as of April 1, 1938 (hereinafter called the indenture), the trustee under which is the appellee First National Bank of Miami (Fdg. 9, R. 246). Under the terms of the indenture and of the Grand River Dam Authority Act, the bonds are payable only from the revenues of the project, and are secured by a prior and preferred lien on such revenues, after the payment of maintenance and operating expenses (Fdg. 17, R. 247-248; Concl. 3, R. 258).²

² All of the Authority's bonds now held by the United States were approved as to legality and validity by the appellant Williamson as Attorney General and *ex officio* Bond Commissioner of the State of Oklahoma (Fdg. 16, R. 247; Govt. Exh. 4, at R. 410-412, 478-480, 488-489, 497-499, 511-512, 518-520). The Grand River Dam Authority Act provides (Section 10) that bonds so approved "shall be valid and

In addition to its investment of \$11,563,000 in the Authority's bonds, the United States has made a grant to the Authority of \$8,437,000, of which \$6,562,500 has already been paid over (Fdgs. 18, R. 248). As of February 20, 1940, the total amount disbursed by the Authority for construction of the project was about \$14,984,000. This sum was paid solely out of funds furnished by the United States under the loan and grant agreement. With the exception of about \$5,000 paid for preliminary expenses by the Oklahoma Planning and Resources Board prior to the date of the allotment, neither the State of Oklahoma nor any of its agencies, instrumentalities or subdivisions contributed any funds at all toward the cost of the project (Fdgs. 19, 20, R. 248).

Prior to construction of the dam, the Authority secured a license from the Federal Power Commission, one of the provisions of which, like the corresponding provision of the loan and grant agreement, required the erection of the dam to elevation 755 (Fdgs. 21, R. 248; R. 156, 162-163).

The Authority commenced the construction of the project on or about February 7, 1938, and by April 25, 1940, the date on which the injunction below was entered, it had virtually completed the main dam. Towards the end of the construction period, a controversy arose between the Authority, on the one hand, and appellants Phillips, Governor

binding obligations," and "shall be incontestible for any cause" thereafter.

of Oklahoma, and Singleton, Meacham, and Bailey, members of the Oklahoma State Highway Commission, on the other, as to the obligation of the Authority to reimburse the State Highway Commission for the state roads which would be flooded as a result of the construction of the project (Fdg. 39, R. 251; R. 541-542). The Authority contended that sometime around March 1938 it agreed with the former State Highway Commission that if the Authority would construct a certain highway bridge, the Commission would accept this bridge in full payment of the Authority's obligation to pay for flooded roads. Thereafter the bridge was in fact built by the Authority at a cost of \$369,083 out of funds furnished by the United States (Fdg. 40, R. 251-252; R. 188).

Governor Phillips, however, contended that there had been no such agreement in fact, or that, if any agreement had been consummated, it was invalid (Fdg. 41, R. 252). He threatened to prevent completion of the dam unless the Authority, or the United States, would make provision for compensating the State Highway Commission for flooded roads above and beyond the provisions for such compensation set out in the Oklahoma Act (Fdg. 42, R. 252). The Authority endeavored to obtain additional funds from the United States, but without success, the Federal Works Administrator insisting that the existence *vel non* of the alleged agreement be litigated as a prerequisite to any

further requests for funds (Govt. Exhs. 18-23, R. 536-543; 572-575.)

The threats of the Governor, so the court below found, were part of a plan on his part to exact for the State of Oklahoma from the United States, money in payment of flooded roads over and above the statutory provisions. The plan was to induce the United States to make such a payment in order to prevent the frustration of the purpose of the grant from the United States, and the impairment or destruction of the security for the bonds owned by the United States (Fdg. 43, R. 252).

As shown by the findings of the court below, the Governor's threat to prevent completion of the dam was, in effect, a threat to destroy the dam itself. The dam is almost a mile long. The major portion of it consists of buttresses supporting concrete arches. The arches are virtually concrete shells deflecting the weight of the water on to the buttresses that actually carry the strain. There is a small portion of the structure at the eastern end which is a gravity dam. This part bears the pressure of the water with its own weight. It is the only part of the dam designed to serve as a spillway. Fdgs. 24-25, R. 249; Gov't Exhs. 14, 14 (a), 14 (b), 14 (c), 14 (d), R. 553-557.

With this kind of structure it was imperative that the six temporary openings which had been provided to permit the normal flow of the Grand River during construction be closed before the on-

set of the spring floods (R. 553, 560). These temporary openings, of course, had to be closed during a period of low water. Previous hydrographic experience on the Grand River showed that the floods came in April, May, and June; that low water was in January, February, or March; and that after the floods there was no substantial amount of high water until the same months of the following year (Fdgs. 26, R. 249; Gov't Exh. 15, R. 558).

In these circumstances, on or about February 10, 1940, the Authority approved a closing schedule submitted to it by its general contractor, the appellee Massman Construction Co. This schedule provided that the temporary openings should be closed when the arches reached elevation 700, as it was estimated that at that elevation further construction on the arches could be completed in sufficient time to carry the arches to the top of the dam—elevation 755—before they could be overtopped by any expected flood. The schedule contemplated that, when the arches reached elevation 700, five of the six openings would be closed with concrete. The remaining opening would be closed by a water-operated steel sluice gate which would permit release of water for the benefit of downstream users until the lake behind the dam reached elevation 678, after which the downstream users would be supplied through the permanent outlet at elevation 675 and through the turbines. The sixth opening was then to be permanently plugged (Fdgs. 27-29, 31; R. 249-250).

If the six openings in the dam had not been closed before high water came down the river, a large volume of muddy water would have gone through those openings at a very high velocity. This would have scoured out the rock adjacent to the buttress walls. If this volume of water had continued to flow for any length of time, there would have been a strong possibility of serious undermining of the foundations of the buttresses, and a probability that the buttresses themselves might have toppled over, carrying the arches with them (Fdg. 32, R. 250). Moreover, even if the openings were closed, there was danger of serious damage to the dam if high water were to come before the arches were completed above elevation 700.³ In this situation, the water would fall from elevation 700 down to the rock foundation at elevation 615, and would cause serious damage to the foundations, tearing out the rock between the adjacent buttresses, and, in all probability, undermining the buttresses. This would result in the destruction of a large section of the dam (Fdg. 33, R. 250). Under the anticipated high water conditions and based on the hydrographic experience on the river, it would not have been possible to take preventive measures in sufficient time to prevent the damage which would have

³ This was the actual condition at the time of the hearing on the preliminary injunction, the openings having been closed after the issuance of the temporary restraining order (Fdg. 30, R. 250).

been caused by the floods in the event that the openings had not been closed or the dam had not been completed (Fdg. 34, R. 250-251).

Physical damage to the structure, however, would have been only one of the consequences of failure to close or complete the dam. In addition, incalculable flood damage and loss of life would have occurred downstream. The United States would have been left with a portfolio of greatly depreciated, if not worthless bonds. The Authority would have been left with a \$15,000,000 ruin. The contractor, appellee Massman Construction Co., would have suffered a severe financial loss and in all probability, have been rendered unable to bid on other projects because of exhausting its bonding capacity. And over a thousand men would have been thrown out of work (Fdg. 35, R. 251).

Moreover, a failure to close the dam, so the court found, would have resulted in the loss of a year's power revenues, estimated at \$1,000,000. If the power pool had been permitted to be formed, but had been kept at elevation 730, the level of the spillway, the annual loss of revenues would have been \$600,000. Unless the dam had been promptly completed and the reservoir area flooded, it would have been impossible to impound sufficient waters for the Authority's power operations for the coming year, with the result that there would have been no revenues available for

the payment of principal or interest on the bonds (Fdg. 36, 38, R. 251).

In addition, the court below found that the marketability of the Authority's bonds and coupons held by the United States would have been seriously impaired if there had been damage to the dam, or delay in its completion or in the formation of the power pool, or if there had been any further interference with the project (Fdg. 65, R. 256).⁴

Despite, or because of, these consequences to be anticipated from cessation of work on the dam, Governor Phillips, on March 13, 1940, declared martial law in an area surrounding part of the dam site, and ordered appellant Ledbetter, Adjutant General of the State, to occupy that area "with the military forces of the State, and to maintain the same with a unit or units of the National Guard, and to maintain such military control against all interference whatsoever." The Adjutant General was specifically directed to stop all work on the dam. (Fdg. 44, R. 252; Govt. Exh. 1, R. 400-A-402.)⁵

General Ledbetter had anticipated the order declaring martial law by more than twelve hours and

⁴ All of the above findings were fully supported by competent evidence. The testimony of the Government's engineering witnesses was not contradicted in any way, appellants having produced no witnesses on any of the engineering issues (Fdg. 37, R. 251).

⁵ The relation between the so-called military zone and the area to be inundated by the project is shown on Govt. Exh. 8a, R. 544.

had given warning orders to one of the machine gun companies of the Oklahoma National Guard. On the night of March 13, three officers, in uniform, arrived at the dam site and ordered the contractor's superintendent not to divert the flow of the river further, not to close the openings, and not to make any further pours on Arch 6 until further orders. No such further orders were ever given. (Fdg. 46, R. 253.)

On the morning of the next day, a machine gun company of the Oklahoma National Guard, fully armed, arrived at the dam site in trucks. The men did not get off the trucks and were sent home about an hour later. General Ledbetter and his staff, also in uniform, arrived on the same morning and stayed most of the day (R. 307). Thereafter the three officers originally present remained at the dam site, in uniform, until March 21. On that day they were relieved by two other officers of the Oklahoma National Guard, who continued on duty, in uniform, as military observers; these officers were still on duty at the time of the hearing on the preliminary injunction (Fdgs. 45-49, R. 252-253).

The court below found that the presence of the armed military personnel constituted a use of armed violence and military force which prevented the Authority and its contractor from closing the dam until March 19, 1940, when a restraining order was issued in this proceeding. It further found that the orders issued by the military personnel hindered the work of the contractor and, but for

the restraining order, would have seriously interfered with the work of completing the dam (Fdgs. 50-51, R. 253-254).

At no time before or during the pendency of martial law as proclaimed by the Governor was there any insurrection, rioting, tumult, or violence displayed against civil authority, or any failure in the functioning of civil authority, in and about the dam site, or the reservoir area, or in the counties in which the dam is located. At no time were the local law enforcement authorities in the vicinity of the dam site and project area unable to perform their duties. The civil courts were not closed and their processes were not interfered with in any way. At no time were lawless acts committed, other than the acts of Governor Phillips and General Ledbetter and their military subordinates, which interfered with the completion of the dam by the Authority (Fdgs. 52-54, R. 254). In short, so the court below found as a fact, there was no necessity or emergency at the dam site or reservoir area authorizing or justifying the use of military force (Fdgs. 66-67, R. 256).

Governor Phillips has not revoked his declaration of martial law, nor has he publicly modified it in any way. Neither he nor General Ledbetter has disclaimed their right or their intention to re-order their troops back to the dam site (Fdgs. 55-56, R. 254). The court below accordingly found that their maintenance of military personnel at the

dam site constituted a threat to order additional military forces to the dam site and reservoir area (Fdg. 56, R. 254).

On the same day that the machine gun company arrived at the dam site, and in furtherance of the Governor's plan to exact money from the United States for the State of Oklahoma, the Governor, Attorney General, and State Highway Commissioners instituted a proceeding in the District Court of Ottawa County, Oklahoma, against the Authority, its directors, its contractor, and two of its officers, seeking an injunction against the closing and completion of the dam. The ground stated for relief was that the Authority had not paid for the damage which would be caused by flooding the state roads, that it could not do so, and that the threatened flooding would result in irreparable injury. On this petition, which did not disclose in any way the interest of the United States in the project, a temporary restraining order issued *ex parte*, returnable on the morning of March 20, 1940, restraining the defendants from closing the six flood gates at the bottom of the dam and from constructing Arch 6 to any point above elevation 700 (Fdgs. 57-58, R. 254-255; Govt. Exh. 13, R. 178-184).

Had this restraining order remained in effect, it would have threatened destruction of the dam by preventing its completion before the spring floods. Thus the effect of the restraining order was the same as the effect of the declaration of martial

law and, as the court below found, both were parts of the same plan on the part of Governor Phillips to exact money from the United States (Edgs. 43, 44, 57, R. 252, 254). The court below further found that the rights and property interests of the United States would in fact have been impaired or destroyed by any relief that could have been granted on the petition in the state court suit, and particularly by the relief prayed and the restraining order granted (Edg. 69, R. 257).

The relators in the state court action had had notice since at least November 1939, of the Authority's intention to inundate the state roads within the reservoir area without prepayment of damage. Yet, prior to the commencement of that action, none of them had taken any steps to enjoin, restrain, or otherwise prevent the Authority from receiving an allotment from the United States, or from accepting the offer of the United States, or from issuing bonds, or from constructing the dam. To the contrary, all the relators acquiesced in all of these actions until March 13, 1940, the date of the declaration of martial law and of the institution of the state court suit (Edgs. 61-62, R. 255-256.)

On March 19, 1940, the day before the return date of the restraining order issued by the state court, the United States, faced with the imminent danger of damage to and destruction of its property interests (Edgs. 69, 70, R. 257), brought the present action against the Governor, the Attorney General, the Adjutant General, the members of the Highway

Commission, the Authority, its contractor, directors, and officers, and the trustee under the indenture, seeking, *inter alia*, a restraining order against any interference with the construction or completion of the dam, whether by military force or in the state court suit, and against any interference with the performance by the Authority of its covenants with the United States, whether contained in the indenture, the Power Commission license, or the loan and grant agreement (Complaint, R. 1-12; and exhibits thereto, R. 12-184).

Upon the verified complaint, supported by affidavits (R. 184-203), the District Court issued a temporary restraining order on the afternoon of March 19, 1940, in substantial conformity with the prayer of the complaint (R. 203-206).^{*} This order restrained the defendants from interfering with the construction or closing of the dam, from proceeding further in the state court suit, from using military force pursuant to the declaration of martial law or otherwise, and, generally, from impairing the performance by the Authority of its covenants with the United States and from injuring the property rights of the United States.

On the following morning, the return date of the state court restraining order, that order expired of its own force.^{*} The United States Attorney then filed a suggestion by the Attorney General of lack of jurisdiction by reason of the ab-

^{*} *Callaway v. Sparks*, 184 Okla. 569, 570, and cases there cited.

sence of the United States, an indispensable party, and by reason of the circumstance that the suit was in effect against the United States and its property (Fdg. 59, R. 255; Govt. Exh. 13a, R. 527-535). No further proceedings have been had in the state court suit.

About two days later, the five temporary openings in the dam were closed with concrete, and the sixth was closed by means of a steel sluice gate (Fdg. 30, R. 250; Govt. Exh. 16, R. 559; Govt. Exh. 17, R. 560).

Pursuant to the terms of the restraining order issued by the federal court, a hearing was held on March 25, 1940, on the application for a preliminary injunction. Since the bill contained an allegation of unconstitutional action by state officers, a three-judge court was convened. Appellants moved to dismiss (R. 207-209), but, after argument, their motion was denied (R. 227, 283-284). At the close of the evidence, the court continued the restraining order in force until May 6, 1940 (R. 399-400). However, the court reconvened on April 25, 1940, when it filed its findings of fact and conclusions of law (R. 245-262), and entered a preliminary injunction, continuing *pendente lite* the terms of the restraining order (R. 262-264).

Since the hearing below, so we are advised, certain changes have taken place in the condition of the project. The dam itself has been permanently closed and its construction completed, the power house, just below the dam, has been completed, and

a large lake has been formed behind the dam. The Authority is now in a position to produce electric power and there remains only completion of transmission lines before power can be sold. But, as we show below in Point VI, these facts by no means render the controversy moot.

SUMMARY OF ARGUMENT

I

1. The United States has property interests which were threatened by the acts enjoined. It is the owner of all the outstanding bonds and coupons of the Authority, which are payable solely from the revenues of the project, and it has a first lien on those revenues. In these circumstances, a threat to destroy the project and thereby to destroy the revenues is a direct threat to destroy the value of the United States' property rights in the bonds. Furthermore, the relationship of the United States to the Authority involves far more than a simple debtor-creditor relationship. Analysis of the closely interrelated provisions of the Grand River Dam Authority Act, of the trust indenture, and of the loan and grant agreement shows plainly that the United States has a direct and immediate interest in the safety and security of the dam, which the State of Oklahoma itself has recognized and which is cognizable in a court of equity. Although the lien of the United States does not attach to the project, *eo nomine*, its rights are so numerous and

substantial as to leave the Authority with little more than legal title to the dam. The court below recognized this by concluding (Concl. 4, R. 258) that "the United States as holder of all the bonds and coupons * * * has a property interest in the dam and project, and is entitled to protect that interest from damage by the unlawful acts of the defendants."

2. Under the relevant statutory provisions, the United States has a right to completion of construction without prepayment of flooding damage to the state. The Authority is specifically authorized by Oklahoma law to flood state roads. Although it is made liable for resulting damages, this liability is payable solely out of the revenues of the project and is junior to the lien of the United States, as bondholder, on those revenues.

II

Sterling v. Constantin, 287 U. S. 378, establishes that where there is no emergency justifying the use of military force, property interests will, as a matter of constitutional right, be protected by injunction against military interference. That decision fully justifies the action of the court below in enjoining appellants' use of military force. The record conclusively establishes the lack of any violence or disorder. And the military force which appellants used seriously jeopardized the property interests of the United States, for it threatened

destruction of the dam and consequent impairment of the United States' investment.

III

1. The court below was also clearly correct in enjoining appellants from further prosecuting the state court proceeding. That proceeding, as the court below found, was part of a plan on the part of the Governor to exact money from the United States in payment of the flooded roads. As in the case of the declaration of martial law, the purpose of the state court action was to prevent the closing and completion of the dam, thereby threatening to destroy the dam and impair the investment of the United States. In view of its nature, prosecution of the action constituted an abuse of the judicial process and was therefore properly enjoined.

2. The state court action immediately and directly affected the property interests of the United States. Under the doctrine of *Minnesota v. United States*, 305 U. S. 382, 386, therefore, the action was an unauthorized suit against the United States in which the United States could not intervene and in which it could not be required to intervene in order to protect its rights.

3. Section 265 of the Judicial Code is not a bar to enjoining prosecution of the state court suit. That prohibition is operative only in cases involving a conflict between state and federal courts having concurrent jurisdiction. Here there is no such

conflict. The state court is without jurisdiction of the proceeding before it because the United States is an indispensable party defendant and the jurisdiction of the federal court is therefore exclusive. Furthermore, Section 265 is not applicable to a case, such as this, where the United States is suing to protect its own property interests.

IV

The present action is not a suit against the State of Oklahoma. It is rather a suit against state officers, purporting to act under state authority, who are invading property interests protected by the federal Constitution. Such a suit is maintainable in a federal District Court and need not be brought as an original proceeding in this Court.

V

The case was properly heard by a statutory three-judge District Court, pursuant to Section 266 of the Judicial Code. In this respect, the present case is squarely governed by the decision in *Sterling v. Constantin*, 287 U. S. 378, which held Section 266 applicable to a suit for relief against the improper use of military force invading constitutional rights of the complainant. The grounds upon which appellants seek to distinguish the *Sterling* case are without substance.

VI

The case is not moot.

ARGUMENT

I

THE UNITED STATES HAS PROPERTY INTERESTS
WHICH WERE THREATENED BY THE ACTS EN-
JOINED

1. THE PROPERTY INTERESTS OF THE UNITED STATES

As pointed out in the Statement, the United States is the owner of all the outstanding bonds and coupons of the Authority. That these bonds constitute property of the United States is not disputed. The property rights of the United States in the bonds consist of the rights to payment of interest and principal out of the revenues of the project, and the right to a first lien on those revenues. In these circumstances, it is apparent, of course, that a threat to destroy the project and thereby to destroy the revenues is a direct threat to destroy the value of the United States' property rights in the bonds. And that the threats here involved were directed toward those property rights is shown by the finding of the court below that the declaration of martial law and the institution of the state court suit were parts of a plan to exact money from the United States by threatening damage to its interests if the state's demand was refused.

It is no answer for appellants to urge that the United States is merely a creditor of the Authority, without any title to or lien on the physical property of the Authority. In the first place, the United

States is seeking, *inter alia*, to preserve against destruction its property interests in the bonds; it has secured ~~an~~ an injunction against interference with completion of the dam, not merely because it has an interest in the dam, but because the threat to destroy the dam was a threat to destroy its property rights in the bonds. Cf. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. The criterion of equitable relief is the immediacy of danger to the complainant's property interests arising from the defendant's acts; even though that danger were caused by a threat to the physical property of another, it would be immaterial.

In the second place, the relationship of the United States, as bondholder, to the Authority involves far more than a simple debtor-creditor relationship. It is true that, under Section 16 of the Grand River Dam Authority Act, the Authority is without power "to mortgage or otherwise encumber" any of its property, except to pledge its revenues. But the obvious purpose of this section is simply to assure that the Authority's property will always remain under public ownership and control. Cf. *Baker v. Carter*, 165 Okla. 116, 25 P. (2d) 747; *City of Bowling Green v. Kirby*, 220 Ky. 839, 295 S. W. 1004. It does not prohibit vesting revenue bondholders with every right in the corpus of the property that a mortgagee would have, except the right permanently to alienate the property through foreclosure and sale. *Id.* And analysis of the closely interrelated provisions of the Act, of

the trust indenture, and of the loan and grant agreement shows plainly that, in fact, the United States, as bondholder, was vested with every such right.

Interest in construction and preservation of physical project.—The Act creating the Authority, which preceded the loan by nearly three years, specifically authorized the Authority to secure a loan and grant from the United States, and “in connection with any such loan or grant to enter into such agreements as the United States * * * may require” (Sec. 2 (o)). The legislature recognized that if such a loan and grant were secured, the United States would have a direct interest in the physical safety of the project, for in Section 10 of the Act it authorized the Authority to issue bonds and to contract with the bondholders “with regard to the construction, extension, improvement, reconstruction, operation, maintenance and repair of the properties of the District” and with regard to the “carrying of insurance upon all or any part of said properties covering loss or damage or loss of use and occupancy resulting from specified risks.”

This latter provision was implemented by a provision in the loan and grant agreement requiring the Authority to insure all its property (R. 109). A similar requirement was included in the indenture, which provided in addition that all policies of insurance were to be in form satisfactory to the

¹ The Authority is referred to throughout the Act as “the District.” Section 1.

trustee, with proceeds payable to the trustee for the benefit of the bondholders (§ 9.08, R. 69-70). The indenture also provided that in case of damage, repairs were to be commenced promptly and payments were to be made from the proceeds of the insurance. *Ibid.* Should the insurance proceeds prove to be inadequate, they were to be deposited with the trustee and held by it as security for the bondholders (R. 71).

Again, the Act prohibited the Authority from disposing of any property necessary for carrying on the dam project (Sections 2 (g), 14). This prohibition was repeated in the indenture (§ 9.06, R. 68; § 12.01, R. 91). The proceeds of any permitted sales were to be paid to the trustee and credited to the Revenue Fund (indenture § 12.01, R. 91), which was to be applied to operating expenses and to servicing the bonds (see p. 29, *infra*). Moreover, the Authority was expressly forbidden by the Act from mortgaging or encumbering any of its property (other than pledging its revenues), or from acquiring property subject to mortgage or conditional sale (Section 14). Similarly, its property was declared exempt from forced sale. *Ibid.* In order to implement these provisions, the indenture itself, and any additional instruments executed pursuant to its terms, were required to be recorded "in such public offices as may be necessary or required by law in order fully to preserve, continue and protect the security of the Bonds and the rights and remedies of the Trustee" (indenture, § 9.07, R. 69).

~~and remedies of the Trustee" (indenture, § 9.07, R. 60).~~

The provisions for construction likewise recognize the interest of the United States in the project. Every phase of construction was required to conform to the detailed provisions of the loan and grant agreement with reference to contracts with contractors (R. 116-117), employment contracts (R. 117-118), wage and hour provisions (R. 118-119), and restrictions concerning the materials used (R. 120-121). Construction reports covering all these matters were required to be filed (R. 121-127). And, under the terms of the indenture, supervision over construction was placed in the hands of the P. W. A. Project Engineer, a federal official (§ 4.05, R. 40-45).

The loan and grant agreement provided that construction should proceed "with all practicable dispatch" (R. 115), the date of completion being set at July 1, 1939 (R. 104A, 129). The same obligation as to dispatch and time of completion was contained in the indenture, with the qualification that the time might be extended upon approval by the P. W. A. Project Engineer (§ 4.08, R. 51). By subsequent waivers, the date of completion was extended to March 30, 1940 (R. 143).^{*} Failure to continue construction with all practicable dispatch would have constituted a default (Concl. 1, R. 257; see also pp. 30-31, *infra*).

^{*} We are advised that, since that date, the time for completion has been extended by day-to-day waivers.

Interest in yield of physical project.—Another important aspect of the United States' interest in the project is its lien on the revenues. The Act empowered the Board of Directors to create such a lien, and to make it prior to any and every indebtedness, liability and obligation, "however entered into or incurred, and whether arising from contract, implied contract, or otherwise" (Sections 9 and 10). Pursuant to this authorization the loan and grant agreement provided that the bonds should be secured by a "first pledge of the gross income and revenues * * * from whatever source derived," subject only to proper expenses of operation and maintenance (R. 102). The same provision appears in the indenture (§ 3.04 (f), Arts. V, VI; R. 35-36, 52-60). The indenture contains the further requirement that the Authority turn all revenues over to the trustee to be held in a special fund, to be known as the Revenue Fund (§ 5.01, R. 52). Moneys out of this fund are first to be used for operating and maintenance expenses (§ 5.02, R. 52-53), under the supervision of the trustee (§§ 5.03, 5.04, R. 53-57), and any funds remaining are to be set aside in a Sinking Fund, to be applied to the payment of principal and interest on the bonds (§§ 5.04, 6.01-6.06, R. 55-60).

The revenues in question will be derived from the sale of water and power. Section 8 of the Act authorized the Authority to establish rates for its services, which were required to be sufficient to pay, first, operating and maintenance expenses, and, next, principal and interest on the bonds.

The same section pledged the State of Oklahoma not to limit the Authority's right to charge and collect such fees. This statutory provision is supplemented by the indenture, which requires the Authority to file with the trustee, prior to the operation date of the project, a schedule of rents and charges calculated to yield sufficient funds to pay expenses of operation and maintenance, and to make the required payments into the Sinking Fund for the servicing of the bonds (§ 9.09, R. 72). The trustee is given supervision over the rates (§ 9.10, R. 73-74).

Possessory interest in project.—The rights given to the United States by the Act and by the indenture in the event of default on the part of the Authority further emphasize its interest in the project. Pursuant to the authorization contained in Section 10 of the Act, Article X of the indenture (R. 74-84) grants the United States broad powers in case of a breach by the Authority of any of its covenants. Provision is made in the indenture for the appointment of a receiver to take possession of the project for the purpose of completing it, upon default by the Authority in its obligation to carry out the work with reasonable dispatch and to complete the project on the date specified (§ 10.07; R. 80). Thus, the parties, by agreement, provided against the very emergency with which appellants' unlawful acts later confronted them. The indenture further empowers the trustee, and the United States as holder of all the outstanding bonds and coupons (§ 10.11, R. 83-84), to take

possession of the system without receivership in the event of default and to "operate the same in the name and as the agent of the Authority" (§ 10.08; R. 80-82),⁹ in substance the common-law right of reentry for condition broken. And finally, the indenture authorizes the United States, by reason of its ownership of all of the bonds of the Authority, to bring suit in its own name to "enjoin any acts or things which may be unlawful or in violation of the rights¹⁰ of bondholders, and to obtain; *as of right*, the appointment of a receiver (§§ 10.02, 10.03, 10.11; R. 76, 77, 84). These last two rights derive from explicit authorization in Section 10 of the Act.

Right to specific performance of covenant to construct.—The Act permits the United States to resort to a suit in equity to enforce its rights under the indenture.¹⁰ Under this provision it is clear that the United States has a right to specific performance of the indenture provision requiring that construction of the project be prosecuted with all possible dispatch and that construction be completed by a specified date (§ 4.08; R. 51). The same is true, upon familiar principles of equity,

⁹ The indenture further provides that "it is expressly agreed that the foregoing powers and remedies shall be cumulative and in addition to every other power and remedy granted the Trustee hereunder or by law * * *" (§ 10.04; R. 77).

¹⁰ It has this right as holder of all the bonds, without reference to the trustee (indenture § 10.11, R. 83-84). This qualification will not be further repeated.

with reference to the covenant to construct contained in the loan and grant agreement (R. 104-A); the remedy at law is inadequate, and specific performance is necessary to prevent frustration of the purpose of the loan and grant. And no basically different principle applies to the condition in the Power Commission license requiring that the dam be built to a certain elevation. We do not contend that, once the license has been granted, the United States could have relied on that instrument alone as a foundation for a bill to compel the Authority to build the dam to elevation 755. Our position is simply that, once the license has been acted upon and the Grand River has actually been obstructed, then the United States is entitled to a decree requiring the Authority to conform the dam to the terms of the license. *United States v. Union Pacific Railway*, 160 U. S. 1.

The cumulative effect of all the foregoing provisions is that, while the lien of the United States does not attach to the project *eo nomine*, its rights are so numerous and substantial as to give it a standing in a court of equity, comparable to that of a lienholder, to protect the property from threatened destruction. Indeed, while the bonds are outstanding and unpaid, the Authority has little more than the bare legal title. The Act itself recognizes this by subjecting the Authority to suit for accounting "as if it were the trustee of an express trust for the bondholders" (Section 10). And the court below similarly recognized it by concluding (Concl. 4, R. 258) that the "United States as holder of all

the bonds and coupons * * * has a property interest in the dam and project, and is entitled to protect that interest from damage by the unlawful acts of the defendants."

It is not essential, however, that the United States have a property interest in the dam itself. The contract rights of the United States as bondholder and by virtue of the provisions of the statute and indenture set forth above are property rights which may be protected against wrongful interference by third parties, as the court below held (Concl. 7, R. 258). It is settled that contract rights are property rights sufficient to entitle the parties thereto to equitable relief against wrongful acts of third persons. See, *e. g.*, *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229;¹¹ *Oklahoma Natural Gas Corp. v. Municipal Gas Co.*, 38 F. (2d) 444 (C. C. A. 10th); *National Life & Accident Ins. Co. v. Wallace*, 162 Okla. 174; *Lumley v. Wagner*, 1 DeG. M. & G. 604. As stated by Mr. Justice (then Dean) Stone, discussing the case of *Lumley v. Wagner*, *supra*, "Obviously, the only property right to be protected here is the property right of the plaintiff in the contract itself, and if the contract is one which equity should specifically perform against the promisor, equity should not hesitate to restrain third persons from any act which would prevent the plaintiff from re-

¹¹ The dissent in this case did not question the general proposition, but proceeded solely on the ground that there had been no interference with the plaintiff's contract rights.

ceiving the benefit of performance of his contract." Stone, *Equitable Liabilities of Strangers* (1918), 18 Col. L. Rev. 291, 311; see also Pomeroy, *Equity Jurisprudence* (1919 ed.), p. 4571.

2. THE UNITED STATES HAS A RIGHT TO COMPLETION OF CONSTRUCTION WITHOUT PREPAYMENT OF FLOODING DAMAGE.

Section 9 of the Grand River Dam Authority Act expressly provides that every "indebtedness, liability, or obligation of the district, for the payment of money, however entered into or incurred, whether arising from contract, implied contract, or otherwise" shall be payable solely out of (a) revenues, or (b) the proceeds of sale of the Authority's revenue bonds if the Board shall so determine. The appellants do not and cannot contend that the Board has authorized payment to the state for flooding damages out of the proceeds of the revenue bonds. The appellants likewise do not and cannot deny that the Government has a prior lien on the revenues. The appellants assert, however, that Section 9 must be construed together with other provisions of the statute and Oklahoma law, and that, so construed, Section 9 is inapplicable to the state's claim for flooding damages (Br. 34-35).

The appellants' contention is entirely without substance. Section 2 (f) of the Act empowers the Authority to acquire any property by condemnation "in the manner provided by general law with respect to condemnation"; the general condemnation

laws, as appellants point out, require that the condemnee be paid the sum awarded by commissioners appointed to appraise the property before possession is taken, although the right is reserved to both parties to test the sufficiency or insufficiency of the award in judicial proceedings subsequent to the taking. Section 2 (h) of the Act, however, makes separate and distinct provision with respect to the flooding of public lands and property. This provision empowers the Authority "to overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this Act: *Provided*, That said district shall be liable in damages to the State of Oklahoma and/or any subdivision thereof for any injury occasioned or expense incurred by reason thereof." Section 2 (h) does not directly require prepayment of damages as a condition of flooding property and does not incorporate by reference any other provision of Oklahoma law embodying such requirement.

Section 2 (p), relied on by appellants, is plainly inapplicable. In the first place, this provision has reference only to damages to private property and not to damages to public property, as to which separate provision is made in Section 2 (h), a distinction maintained in the general condemnation and conservancy laws as well. See Oklahoma Statutes, 1931, Secs. 10046, 13240; Okla. Stat. Ann., Title 27, § 1, Title 82, § 531. It is only as to the damages dealt

with in Section 2 (p) that the conservancy laws are made applicable. Moreover, Section 2 (p) speaks only of the procedure for the "determination" of damages under the conservancy act, and does not directly or by reference incorporate any provision in that act requiring prepayment.

The appellants' contention that Section 9, as construed by the Government, is in violation of Article V, Section 53 of the Oklahoma constitution (Br. 33-34), is clearly insubstantial. The Governor and the State Highway Commission certainly cannot be heard to urge either in the federal or state courts that a public law, enacted by the legislature of the state, is invalid. *Cf. Trenton v. New Jersey*, 262 U. S. 182; *Hunter v. Pittsburgh*, 207 U. S. 161; *Byars v. State*, 2 Okla. Crim. 481, 102 Pac. 804. Section 9, moreover, is plainly not in violation of the state constitution, first, because it does not waive or release the claim of the state, and second, because the Authority is a subdivision of the state, and the provision of the state constitution relied upon obviously has no relation to a claim of the state against itself.

The fact, if it be a fact, that the provision thus made by the state legislature for flooding damages may not be in the best interests of the state is immaterial. By passing the Act, the state expressly consented to the flooding of its highways and, although requiring payment for such flooding, it empowered the Authority to make the liability for that payment subordinate to the lien of the bond-

holders (Sections 1 (b), 2 (b), 9). In the light of this, appellants' threat to prevent completion of the dam unless liability for flooding is prepaid appears to be directly in conflict with the statutory pledge of faith (Section 8) that "the State of Oklahoma * * * will not * * * in any way impair the rights or remedies of the holders of the bonds * * * until the bonds * * * and all other obligations of the district in connection with such bonds are fully discharged."

II

THE COURT BELOW PROPERLY ENJOINED APPELLANTS' ILLEGAL USE OF MILITARY FORCE

The bill in the present case alleged (par. 22, R. 6-7) that the action taken by Governor Phillips and General Ledbetter was in contravention of the Fourteenth Amendment, and the court below so held (Concl, 16, R. 259). This holding is in accord with the decision in the *Sterling v. Constantin*, 287 U. S. 373, that illegal military interference with property under color of state action constitutes a deprivation of property without due process of law.

1. Since this Court's decision in the *Sterling* case, it has been settled that, where there is no actual or apparent violence threatening public safety, the use of military force which interferes with property rights will be enjoined. In that case, the Governor and the military authorities of Texas were restrained from curtailing the production of

complainant's oil wells under color of a declaration of martial law when there was in fact no violence or disorder of any kind.

The ruling in the *Sterling* case has been followed in the lower federal courts, and in every state court where the question has arisen (Oklahoma included), in situations involving military interference with property interests under conditions of peace and quiet. Thus, the courts have enjoined the use of military force to curtail oil and gas production (*Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P. (2d) 582), or to influence a primary election (*Joyner v. Browning*, 30 F. Supp. 512 (W. D. Tenn.)), or to remove highway commissioners (*Hearon v. Calus*, 178 S. C. 381, 183 S. E. 13; *Miller v. Rivers*, 31 F. Supp. 540 (M. D. Ga.), reversed as moot, 112 F. (2d) 439). Similarly, they have struck down as void action taken pursuant to illegal military coercion, as where martial law was employed to force a city council to enact an unconstitutional segregation ordinance. *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. (2d) 1054.

The test of the propriety of the use of military force, as these cases show, is whether there has been actual violence threatening the public safety which requires the use of troops for its suppression and for the restoration of order. If there is no such violence, actual or imminently threatened, then the use of military force will be enjoined. Similarly, where the means employed bear no reasonable relation to the end sought, as where measures of mar-

tial law were used to close a factory in order to settle a strike, the property owner is entitled to injunctive relief. *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn.). Where, however, there is violence in fact, the courts will not interfere (*Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind.)), even though the court may disagree with the executive as to the wisdom of the measures employed. *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn.).

That the Governor of a state has a wide range of discretion in the discharge of his obligation to enforce and execute the laws is, of course, well recognized. See *Sterling v. Constantin*, 287 U. S. 378, 399-400. But the proper limits of military discretion are always subject to judicial review. As the Court stated in the *Sterling* case (287 U. S. at 400-401):

It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be

taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. "But we are clearly of opinion," said the Court speaking through Chief Justice Taney, "that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." *Mitchell v. Harmony*, 13 How. 115, 134. See, also, *United States v. Russell*, 13 Wall. 623, 628. There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.

The basis of all the decisions cited is that an executive proclamation of emergency or of martial law will not legalize the use of military force when in fact there is no violence or disorder to occasion the use of such force. The Governor's fiat does not shut off judicial review; a bogus martial law situation affords no justification for military interference with property. *Sterling v. Constantin*, *supra*; *Strutwear Knitting Co. v. Olson*, *supra*; *Russell Petroleum Co. v. Walker*, *supra*; *Hearon v. Calus*, *supra*; *Miller v. Rivers*, *supra*; cf. *State*

v. *McPhail*, 182 Miss. 360, 180 So. 387. The contrary contention—that an executive declaration of martial law has “the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government,”—was made in *Sterling v. Constantin*, *supra*, only to be decisively rejected. See 287 U. S. at 397–398, 402–403.

In view of the *Sterling* decision, no purpose would be served in prolonging the discussion here. It is sufficient to say that every argument which can be advanced here in favor of Governor Phillips of Oklahoma has already been made on behalf of Governor Sterling of Texas. Nor would it be profitable to attempt to distinguish the two cases, with a view to contending, on the one hand, that the *Sterling* case was more flagrant on its facts than the one at bar because it involved defiance of a court order, or of arguing, on the other hand, that the present appellant is more blameworthy because he at least had the benefit of a long line of precedents showing his action to be wrong, and—as this record reveals—took action against the advice of his Attorney General (R. 395). In substance, there is no difference between the two situations and the court below was therefore clearly right in enjoining appellants' military interference.

2. The court found, and the evidence establishes, that the military force used by appellants interfered with and would seriously have injured the United States' property interests. The effect of

the declaration of martial law, the ordering of troops to the dam site, and the directions given to General Ledbetter to stop all work on the dam was to jeopardize the safety of the entire project. As pointed out in the Statement (*supra*, pp. 11-13), had appellants succeeded in preventing the closing of the temporary openings and the completion of the dam to elevation 755 until the onset of the spring floods, as they threatened to do, the consequence would have been certain damage to and probable destruction of the dam and a corresponding impairment of the United States' large investment in the project.

To prevent this impending injury, the United States had but two alternatives. One was to seek an injunction against appellants' illegal acts; the other was to meet force with force. The seriousness of the latter alternative, which would clearly have been within the power of the President,¹² impelled the United States to seek the former remedy. But the very existence of the possibility that, in the absence of judicial relief, force might have been met with force emphasizes the necessity for recognizing the judicial power exercised by the court below and the propriety of the injunction which it granted.¹³

¹² It is clear that the President may, if necessary, use physical force to carry out his constitutional mandate (Art. II, Sec. 3) to "take Care that the Laws be faithfully executed". *Ex parte Siebold*, 100 U. S. 371, 395.

¹³ The present case is not an isolated instance of a state using military force against the property and interests of

Appellants' attempt to minimize the seriousness of the military action taken is without merit. It is true that no shots were fired by the militia and that the machine gun company sent to the dam stayed but a short time and did not get off the trucks. But certainly it is not necessary, in order to constitute military force, that the soldiers' arms be actually discharged; the mere presence of troops, in uniform and fully armed, constitutes a use of military force. As Judge Williams said at the hearing (R. 340): "The way I construe that, when they go there with authority dressed as soldiers, their presence is force." And the court so found and held (Fdg. 50, R. 253; Concl. 8, R. 258).

Appellants rely (Br. 6-7) on the so-called "directive" (Govt. Exh. 11, R. 545), which purportedly emanated from the Governor, and allegedly directed the Adjutant General not to use unnecessary force to interfere with the construction of the dam, and to execute the order declaring martial law only to the extent necessary to protect public prop-

erty the United States. In *Sterling v. Constantin*, 287 U. S. 378, a general officer of the Texas National Guard defied and disobeyed the order of a United States court. The Governor of Arizona, in the course of one phase of the Colorado River controversy, called out the National Guard to prevent a federal contractor from constructing Parker Dam. See *United States v. Arizona*, 295 U. S. 174, 179, and see par. XII of the bill and answer in that case. The Governor of Iowa, in the summer of 1938, ordered the National Guard of that state to prevent the holding of a hearing by the National Labor Relations Board. See *New York Times*, July 31, August 1-5, 1938.

erty. It is difficult to see how an order not to use "unnecessary" force exculpates the use of force. But, in any event, a finding requested by appellants to the effect that such directions were given by the Governor (No. 3, R. 231) was denied by the court (R. 257), and refusal to make this finding was not assigned as error.

The evidence fully supports the court's action in this respect. The proclamation of martial law specifically and unequivocally directs the Adjutant General to stop all work at the dam (Govt. Exh. 1, R. 401). The latter's telegram to Major Parris (Govt. Exh. 12, R. 335-336, 548) says nothing of any modification of the proclamation along the lines of the "directive". General Ledbetter admitted (R. 321) that the proclamation was never publicly modified. The foregoing circumstances are particularly significant when considered in the light of the physical condition of the "directive."¹⁴

Appellant's argument on the use of the National Guard (Br. 49-50) proceeds upon the assumption that the Governor of a state has the power to use the National Guard as a species of auxiliary police, who may act independently of local peace officers, and may even investigate whether the local officers are enforcing the law. It seems a sufficient

¹⁴ The "directive" was unsigned, undated, uninitialed, without any trace of a receiving stamp, and without any of the indicia of a letter or memorandum received or prepared in the ordinary course of business (R. 320, 321, 545). Unfortunately the exhibit was not reproduced in facsimile as directed in the praecipe (R. 279).

answer to this ingenuous contention to point out that the National Guard in the present case was not employed in any such manner, nor for any such purpose. Here the Governor, in terms, declared martial law (Govt. Exh. 1, R. 400-A-402), and directed the Adjutant General to exercise and maintain military control in the "military zone" at the dam-site and to stop all work at the dam.

Under color of this declaration, the Guard appeared at the dam site and ordered the stoppage of work (Fdg. 46, R. 253). The court below found that these orders hindered the work of the contractor, and, "by the time of the hearing on the application for a temporary injunction in this cause, would (but for the restraining order heretofore issued herein) have seriously interfered with the work of completing the dam" (Fdg. 51, R. 253-254). That finding was amply supported by evidence (R. 317).

These facts make it clear that there was military interference with the work. The proclamation reflects the intent to interfere and the troops called out were an adequate force to translate the Governor's intention into action. At the very least there was a threat of interference. In these circumstances an injunction restraining such interference was amply justified.

3. The United States is, of course, entitled to the protection afforded by the Fourteenth Amendment. This not only follows from the general rule that the sovereign can always take advantage of pro-

tective provisions even though not specifically named therein (see *Savings Bank v. United States*, 19 Wall 227, 239; *United States v. Chamberlin*, 219 U. S. 250, 261), but it is also a necessary complement of the doctrine that, when the property of a state is taken as a result of federal action, the state may claim the benefit of the Fifth Amendment. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Wyoming v. United States*, 255 U. S. 489, 508-509; *Wayne County v. United States*, 53 C. Cls. 417, affirmed 252 U. S. 574.

Certainly, it would be strange if, while a state of the Union could avail itself of the prohibition resting on the United States, "nor shall private property be taken for public use, without just compensation," the United States should be unable to claim the protection of the injunction resting on the states, "nor shall any state deprive any person of * * * property without due process of law." No distinction can properly be drawn between the two prohibitions based on the use of the word "person" in the Fourteenth Amendment. In *Ohio v. Helvering*, 292 U. S. 360, this Court held that a state is a "person" within the federal statute imposing taxes upon dealers in intoxicating liquors; upon the same reasoning, the United States is a "person" within the meaning of the Fourteenth Amendment. Cf. *Stanley v. Schwalby*, 147 U. S. 508, 517. Any other conclusion would mean that the property of the United States would

be less secure in the face of arbitrary and illegal military action than that of an oil operator (*Sterling v. Constantin, supra; Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P. (2d) 582); than that of a corporation engaged in the manufacture of underwear (*Strutwear Knitting Co. v. Olson, supra*), than the office of a State Highway Commissioner (*Hearon v. Calus*, 178 S. C. 381, 183 S. E. 13; *Miller v. Rivers*, 31 F. Supp. 540 (D. C. M. D. Ga.)) or than the right to become a candidate for and to hold public office, or to vote in a primary election (*Joyner v. Browning*, 30 F. Supp. 512 (W. D. Tenn.)).

Alternatively, the allegation of unconstitutionality in the complaint (R. 7) may be upheld under the supremacy clause of the Constitution (Art. VI, clause 2), although the literal language of that clause is hardly helpful. Actually, of course, the gravamen of the bill is unconstitutional state interference with a federal function, the constitutional basis for which—as in the case of the doctrine that the United States cannot be sued without its consent¹⁵ or that it is not bound, even in a state court, by a state statute of limitations¹⁶—must be looked for in the Constitution as a whole, having regard to the ultimate supremacy and sovereignty of the United States under the federal system.

¹⁵ See *United States v. Shaw*, 309 U. S. 495; *United States v. U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

¹⁶ See *United States v. Summerlin*, 310 U. S. 414.

III

THE COURT BELOW PROPERLY ENJOINED APPELLANTS
FROM PROSECUTING THE STATE COURT ACTION

1. THE STATE COURT ACTION CONSTITUTED A THREAT
TO THE PROPERTY INTERESTS OF THE UNITED STATES

The court below found, and the record conclusively establishes, that the Governor's institution of the state court suit, together with his threats to stop the completion of the dam, his declaration of martial law, and his ordering of troops to the dam-site to stop work on the dam, were all "part of a plan on his part to exact for the State of Oklahoma from the United States money in payment of flooded roads over and above the statutory provisions, which payment the United States would be induced to make in order to prevent the frustration of the purpose of the grant from the United States, and the impairment or destruction of the security for the bonds owned by the United States" (Edgs. 42, 43, 44, 57, R. 252, 254-255). The court below further found, and the record also conclusively establishes, that the "rights and property interests of the United States * * * would in fact be impaired or destroyed by any relief that could be granted on the petition in * * * [the state court action], and particularly by the relief prayed and by the restraining order already granted" (Edg. 69, R. 257).

We have pointed out in the Statement the reasons why prosecution of the state court action

would have had the effect ascribed to it by the court below. To prevent damage to and probable destruction of the dam, it was necessary that the temporary openings in the dam be closed and the dam be completed to elevation 755 before the onset of the spring floods. Yet the relief prayed for in the state court action, and temporarily secured by the terms of the restraining order issued in that action, was, an injunction against closing those openings and completing the dam.¹⁷ The suit was, therefore, a direct threat to destroy the project itself and to impair the property interests of the United States.¹⁸ Its purpose, as analysis of the petition and of the position of the parties shows, was not to vindicate the alleged rights of the state, but to coerce compliance by the United States with the Governor's illegal demand.¹⁹

¹⁷ That the Grand River Dam Act was within the constitutional competence of the Oklahoma legislature had already been affirmatively established by the highest court of the state. *Sheldon v. Grand River Dam Authority*, 182 Okla. 24, 76 P. (2d) 355. The *Sheldon* case was decided on February 1, 1938; construction of the dam did not commence until a week later (Fdg. 20, R. 248).

¹⁸ It cannot be assumed that the Governor was ignorant of the natural and probable consequences of his conduct, particularly since he had the benefit of the services of Colonel Donnell of the National Guard, who in private life was Professor of Engineering at the Oklahoma A. & M. College (R. 331; Gov't Exh. 11b, R. 546). It is to be noted in this connection that appellants offered no evidence to contradict the testimony of the Government's engineering witnesses (Fdg. 37, R. 251).

¹⁹ The Attorney General testified (R. 397): "He [the Governor] did express a desire to obtain what he said was

Although, for the reasons pointed out above (pp. 34-36), it is clear that, under the Oklahoma statute and the indenture, the state had no right to the prepayment of flooded damages and that its claim for such damages out of the revenues of the project was junior to the lien of the United States, we do not suggest, of course, that appellants were not entitled to litigate these questions. But, as the court below found (Fdg. 57, R. 254-255), that was neither the purpose nor effect of the state court proceeding. The petition in that proceeding (see Govt. Exh. 13, R. 182-183) raised no issue of priority and did not seek flooding damages. To the contrary, it sought merely an injunction against completing or closing the dam unless and until such damages were paid. And the restraining order issued on the petition was simply a peremptory command to halt work (Govt. Exh. 13, 178-179).

In essence, the state court proceeding amounted to no more than a suit to enjoin a trespass. It did

the reasonable value of the roads. * * * He would stop everything unless he got it; he was moving toward that end." And in an affidavit, Clark Foreman, Director of the Power Division of the Public Works Administration, stated (R. 191-192): "* * * Deponent told the Governor of the State of Oklahoma that it was the Deponent's understanding that the Public Works Administration had definitely decided there were no more Federal funds available to advance to the Authority for such purposes. To the best of my recollection and belief, the Governor thereupon said that unless the Federal Government was willing to put up this money the Dam would never be completed while he was Governor of Oklahoma." To the same effect is the Elliott affidavit (R. 189); compare the Carmody affidavit (R. 185).

not seek an adjudication of the respective priorities of the State of Oklahoma and of the United States, nor did it even purport to do so. The interest of the United States was not disclosed. The damage to the project which would have been the necessary consequence of the prohibitions of the restraining order, or of the relief prayed for, or of any relief which could be granted on the petition (Fdg. 69, R. 257), was not disclosed. The relative equities of the claim for flooding damages, on the one hand, and the aggregate investment in the project, on the other, were not disclosed. The petition contained no allegation of unconstitutional action on the part of any of the defendants. And no mention was made in the pleadings of the circumstance that the relators had knowledge for many months of the Authority's purpose to flood the highways without prepaying whatever damages might be caused thereby (Fdgs. 61-62, R. 255-256). A petition so framed cannot fairly be characterized as the institution of a *bona fide* litigation to vindicate threatened rights of the state.

This is emphasized by the control possessed by the Governor over all parties to the litigation with the exception of the Massman Construction Company. Joined with the Governor as plaintiff was the State Highway Commission, all of the members of which are removable by the Governor at any time.²⁰ The defendants were the Authority, its

²⁰ Section 2, Article 1, chapter 50, Oklahoma Session Laws of 1939; Concl. 18, R. 259.

directors and officers and its general contractor. The directors of the Authority, who, of course, control appointment of the officers, are removable by the Governor "for inefficiency, neglect of duty or misconduct in office," upon mere ten days' written notice and without any hearing.²¹ Thus the Governor had the power of official life and death over persons on both sides of the controversy; in every real sense he was *dominus litis*.

This is not merely a theoretical consideration. The State Attorney General testified that the Governor was determined to "stop everything" on the dam (R. 397) and it appeared from one of the Government's affidavits that the Governor had said that unless the federal Government put up the money he demanded, "the Dam would never be completed while he was Governor of Oklahoma" (R. 192). It is significant that the members of the Authority gratuitously instructed their counsel not to remove the case to the appropriate federal court (Concl. 19, R. 259).²²

It seems plain, therefore, that the suit was, from a practical point of view at least, a nonadversary one, that its institution was promoted by the motive of coercion rather than by a desire to litigate a disputed claim, and that, if prosecution of the suit

²¹ Section 1, Article 1, chapter 50, Session Laws of Oklahoma of 1939, amending Section 3, Article 4, chapter 70, Session Laws of Oklahoma of 1935; see Concl. 17, R. 259.

²² The court below was of the opinion that the state court proceeding would have been removable if all defendants thereto had joined in the removal (Concl. 20, R. 259).

had not been enjoined, its effect would have been, not the protection of any substantial rights of the state, but the destruction of a tremendous investment by the United States, which was not a party to the suit and whose interests in the suit were not even disclosed to the state court.

In these circumstances, there can be no doubt that the prosecution of the suit was properly enjoined. The attempted enforcement of an unfounded claim by resort or threat to resort to legal proceedings attended with destructive consequences amounts to the exercise of legal duress. See 5 Williston, *Contracts* (rev. ed.) Secs. 1606-1607, and cases cited. Against such an abuse of the judicial process, injunctive relief is clearly available. Thus it is well settled that the prosecution of an action to foreclose a mortgage may be enjoined where the proceeding is instituted to enforce an unfounded claim. Jones, *Mortgages* (8th ed.) Sec. 1845, and cases cited; High, *Injunctions* (4th ed.) Secs. 442, 1123. The present proceedings in the state court constituted a similar abuse of process and, on similar reasoning, were properly enjoined.

The United States made known to the state court the full and complete facts of the situation. The Attorney General of the United States filed in the state court a suggestion of lack of jurisdiction (Govt. Ex. 13a, R. 527-534) setting forth in detail the interests of the United States and the effect upon those interests of the state court proceedings,

thereby giving the state court fair and reasonable opportunity to take appropriate action. This suggestion was filed prior to the hearing on and issuance of the order appealed from.

Little need be said concerning appellants' suggestion (Br. 27-29) that the United States was estopped from seeking to enjoin the state court proceeding because Mr. Carmody, the Federal Works Administrator, had indicated his view that the state's claim for flooding damages should be settled by litigation. The short answer is that the type of suit suggested by Mr. Carmody was an orderly action to determine the validity of the state's claim; he certainly did not suggest the institution of an injunction proceeding, in which no damages whatever were asked, in which the interests of the United States were neither represented nor disclosed, and the purpose of which, as the court below found, was not to secure judicial settlement of the claim but rather to use the judicial process as a method of coercing extra-judicial settlement of the Governor's demand.

The United States had but one effective means for securing relief against the imminent injury to its interests threatened by the maintenance of the state court action and that was the institution of the present proceeding.

2. THE STATE COURT ACTION WAS IN EFFECT AN UNAUTHORIZED SUIT AGAINST THE UNITED STATES IN WHICH THE UNITED STATES COULD NOT HAVE INTERVENED.

It is evident from the preceding discussion that the state court action immediately and directly affected the property of the United States and that, as such, it was an unauthorized suit against the United States. As this Court recently observed in *Minnesota v. United States*, 305 U. S. 382, 386:

A proceeding against property in which the United States has an interest is a suit against the United States. *The Siren*, 7 Wall. 152, 154; *Carr v. United States*, 98 U. S. 433, 437; *Stanley v. Schwalby*, 162 U. S. 255. Compare *Utah Power & Light Co. v. United States*, 243 U. S. 389.

In the *Minnesota* case, a state brought suit in the state courts to condemn a right of way for a highway over lands held by the United States as trustee for Indian allottees. This Court held that the United States was an indispensable party defendant and, since Congress had not authorized the suit, it was not maintainable. This ruling is, of course, fully applicable to the present case. Indeed the interest of the United States is more direct and immediate here than in the *Minnesota* case, for there it was merely a trustee of the property while here its own beneficial interests in property are involved.

As the *Minnesota* decision shows, it is immaterial that the United States was not made a party to the state court action; a suit which necessarily affects the property interests of the United States is a suit against the United States even if it is not formally joined therein. Thus, in *Arizona v. California*, 298 U. S. 558, this Court refused a state permission to file an original bill against six other states for the apportionment of unappropriated waters of the Colorado River, on the ground that the United States had an interest in the matter and was therefore an indispensable party. This decision is but one of many illustrations of the established principle, trenchantly phrased by Mr. Justice Holmes, that the United States "cannot be interfered with behind its back." *Goldberg v. Daniels*, 231 U. S. 218, 221, 222; cf. *Belknap v. Schild*, 161 U. S. 10. Surely it would be difficult to find a more flagrant example of interference with the United States "behind its back" than the state court proceeding here involved.

Appellants' contention that the state court suit was not one against the United States is based primarily upon the decisions of this Court in *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Goltra v. Weeks*, 271 U. S. 536; and *Ickes v. Fox*, 300 U. S. 82. Those cases are, of course, entirely beside the mark; they merely hold that a suit against a federal officer, in his personal capacity, for abuse of power is not a suit against the United States. Here there

was no allegation in the state court action that any federal official had taken or was threatening unauthorized action and no relief against any such official was asked. Our position is not, as assumed by appellants (Br. 53-55), that the Authority is an agency of the United States and that therefore any suit against the Authority must be one against the United States. Our position is rather that any relief granted in the suit against the Authority would operate immediately upon property rights owned by the United States and that consequently the United States was an indispensable party defendant.

Here, as we have shown, the United States has a direct interest in the project itself, and the case is, therefore, on all fours with *Minnesota v. United States, supra*. Quite apart from the Government's interest in the dam, however, the contract rights of the United States are property rights and a judicial proceeding directly interfering with the enforcement of such rights is a suit against the United States. The principle in the *Minnesota* case applies equally to actions involving intangible and tangible property rights of the United States. It cannot be doubted that any effort by the appellants to induce the Authority to violate its contract with the United States would constitute an interference with the property rights of the United States, and, if wrongful, could be enjoined. On like principle, institution of a judicial proceeding to accomplish

the same result is an interference with the property of the United States, and the action therefore cannot be maintained without the Government's consent.

Since the state court proceeding was a suit against the United States, it necessarily follows that the United States could not, and could not be required to, intervene in that proceeding as the price of protecting its property from injury. Again the decision in *Minnesota v. United States*, 305 U. S. 382, is conclusive, for there this Court stated (pp. 388-389): "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States. Compare *Case v. Terrell*, 11 Wall. 199, 202; *Carr v. United States*, 98 U. S. 433, 435-39; *Finn v. United States*, 123 U. S. 227, 232-33; *Stanley v. Schwalby*, 162 U. S. 255, 270; *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533-35."

The statute relied upon by the appellants to establish the contrary proposition, R. S. 367, 5 U. S. C. § 316, is obviously inapplicable. That statutory provision is not an authority to the Attorney General to consent to suits against the United States. Although it authorizes the Attorney General to attend to the interests of the United States in proceedings in state courts, including suits to which the United States is not a party and cannot be made a party, it does not authorize the Attorney General to submit the United States to the juris-

diction of any court in any case where Congress has not consented that the United States be sued. To the contrary, it simply reflects the historical rule, derived from English practice, that the Attorney General may represent the public interest in any litigation. Cf. *Booth v. Fletcher*, 101 F. (2d) 676 (App. D. C.), certiorari denied, 307 U. S. 628. Thus it authorizes what was in fact done in this case—the filing in the state court of a “suggestion by the Attorney General of the United States of lack of jurisdiction” suggesting that the state court suit be dismissed for want of jurisdiction as a suit against the United States and its property. Under R. S. 367 the Attorney General may in a variety of situations file suggestions asserting the interest of the United States, including nonpecuniary interests, and including suggestions going to the merits as well as to jurisdiction. When he does so he appears in his *proper person*, not in the name of the United States, and does not submit the United States to the court’s jurisdiction. Cf. *Florida v. Georgia*, 17 How. 478. Nothing in E. S. 367 or in the doctrine of *Florida v. Georgia* cuts into the rule of absolute non-waivable immunity stated in *Munro v. United States*, 303 U. S. 36, 41 and *Minnesota v. United States*, 305 U. S. 382, 388.

Certainly the immunity of the United States from suit cannot be circumvented by the simple device of requiring it to intervene for the purpose of protecting its rights. This would be merely an indirect method of achieving the forbidden end, of

accomplishing by a forced intervention what could not be attained by direct suit. No such evasion of the United States' immunity has yet been sanctioned by this or any other Court. Compare *Stanley v. Schwalby*, 162 U. S. 255; *United States v. Inaba*, 291 Fed. 416, 419 (E. D. Wash.).

The decisions upon which appellants rely (Br. 53) are not opposed to our position. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463; *New York v. New Jersey*, 256 U. S. 296; *Merryweather v. United States*, 12 F. (2d) 407 (C. C. A. 9th).²³ Those cases merely hold that where a state court has assumed jurisdiction over property, the United States must assert any claim which it has to that property in the state court proceeding. It will be noted that in each instance the state court proceeding was an *in rem* action and that the position of the United States was that of a claimant rather than that of a defendant. A holding that the United States may, and in some instances must, appear in the state courts to assert a claim to property in the possession of the state court is not, of course, authority for a ruling that the United States may be made, or may become, a defendant in an *in personam* action in the state courts.

The rule in the decisions cited is designed to preclude a conflict between competing jurisdictions over the same property, and to avoid such results

²³ *Ponzi v. Fessenden*, 258 U. S. 254, also cited by appellants, seems plainly irrelevant to the question here considered.

as actual personal collision between two sets of officers attempting a physical seizure of the same res. See *Watson v. Jones*, 13 Wall. 679, 719. The decisions apply, therefore, only to proceedings *in rem* where the first court has possession, actual or constructive, of specific property; they have no application to proceedings *in personam*. The distinction for present purposes between *in rem* and *in personam* proceedings is a clear one. Jurisdiction *in rem* exists only where the suit is one "to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property." *United States v. Bank of New York & Trust Company*, *supra*, at 477. In brief, an action is *in rem* and the jurisdiction of the court first acquiring actual or constructive possession is exclusive only where conflicting claims of ownership are involved and where actual control of the property may be required in the disposition of the case. The state court proceeding involved in the instant case was plainly not a suit of this type.

The state court does not have in its possession or control any property to which the United States is asserting a claim, nor is any such control necessary to dispose of the issues raised by the complaint. That court only undertook, as we have pointed out, to enjoin a trespass.²⁴ No question of priority was

²⁴ It is clear that a suit for an injunction is an action *in personam*. *Armour & Co. v. Miller*, 91 F. (2d) 521 (C. C. A. 8th); *Sain v. Montana Power Co.*, 84 F. (2d) 126 (C. C. A.

involved, and even if there were, that question could have been settled without any control or disposition of the property itself. Indeed, it seems absurd to suggest that by the filing of a mere action to enjoin a trespass, the state court acquired exclusive jurisdiction to decide any other question which might involve the construction and operation of the dam, including the question of the relative priorities of the United States and the state, the right of the state to stop the construction of and hence to destroy the dam as a means of enforcing its alleged right to payment for the flooding of its lands, and in particular, the constitutional validity of the declaration and enforcement of martial law to enforce such payment.

The authorities clearly establish the contrary. They show that the state court had no exclusive jurisdiction, that the United States was not required to intervene in the state court action to resist the threat to its interests, and that the Government was therefore entitled to institute the present action in the federal courts. *Hunt v. New York Cotton Exchange*, 205 U. S. 322; *Grubb v. Public Utilities Comm. of Ohio*, 281 U. S. 470; *Chase National Bank v. City of Norwalk*, 291 U. S. 431.²⁵

9th); 1 Clark, *Receivers* § 210; McClintock, *Equity* (1936) § 34. A violation of an injunctive order does not require a court to proceed against property; enforcement is by contempt proceedings against the person offending.

²⁵ In *Hunt v. New York Cotton Exchange*, *supra*, Hunt sued in a state court to enjoin a telephone company from terminating its service of furnishing him with stock market

Appellants seek to avoid the force of our position by the novel suggestion (Br. 44) that, even if the United States itself could not have intervened in the state court proceedings to protect its rights, it could have secured such protection by having the trustee under the indenture intervene. But plainly the United States is not required to rely

quotations. The circumstance that the state court issued an injunction agreeable to the prayer of the bill was held not to prevent the federal court from entertaining a suit by the New York Cotton Exchange to enjoin Hunt from receiving and using the same quotations. In *Grubb v. Public Utilities Comm. of Ohio*, *supra*, a Public Utility Commission had expressly prohibited Grubb from operating a line of motor busses over a certain route. Grubb then sued in the federal court to restrain enforcement of the prohibition, subsequent to which a review of the Commission's decision was sought by both parties in the state court. This Court held that both suits could proceed concurrently. Similarly, in *Chase National Bank v. City of Norwalk*, *supra*, *quo warranto* proceedings had been instituted in a state court by the state at the City of Norwalk's request, to oust a power company from continuing to maintain power lines in the city. A judgment of ouster having been rendered, the trustee of the power company sued the City of Norwalk in the federal court to enjoin the city from interfering with the power company. This Court upheld the right of the federal court to grant an injunction.

The circumstance that here the Authority or its contractor might have been subjected to conflicting orders if the state court restraining order had not expired would not have been sufficient ground for the court below to refuse jurisdiction in the instant case. In *Hunt v. New York Cotton Exchange*, *supra*, the argument that Hunt could not have the benefit of the state court decree without being held in contempt in the federal court was not deemed a sufficient bar to the federal court's taking jurisdiction and issuing its injunction. See also *Riggs v. Johnson County*, 6 Wall. 166, 199.

for the safety of its own property upon representation of its interests by a local banking institution, over whose conduct of the litigation it might have no effective control. Indeed, this was specifically guarded against in the indenture, which provides that the United States, as holder of all the bonds, may exercise all the rights of the trustee without making demand on the trustee (§ 10.11, R. 83-84). Injunctive relief can be denied a complainant threatened with irreparable injury only where the complainant has a full and adequate remedy elsewhere; participation in the state court proceeding by the First National Bank of Miami is scarcely a full and adequate remedy for the United States. As Mr. Justice (then Judge) Cardozo so aptly observed, "Equity will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm the purpose of the wrongdoer." *Falk v. Hoffman*, 233 N. Y. 199, 202, quoted with approval in *Deckert v. Independence Shares Corp.*, Nos. 17 and 18, present Term, decided December 9, 1940.

The conclusion follows that the United States had no adequate remedy against the imminent danger to its property interests threatened by the maintenance of the state court suit and that, therefore, the court below was clearly correct in granting injunctive relief.

3. SECTION 265 OF THE JUDICIAL CODE IS NOT A BAR TO ENJOINING PROSECUTION OF THE STATE COURT ACTION

A. Section 265 of the Judicial Code (*infra*, pp. 117-118)²⁶ is not, and was never designed to be, a limitation upon the jurisdiction of federal courts; it is simply a restriction, in the interest of comity, on the power of the federal courts to grant equitable relief. And it has been consistently construed over the years to effectuate its purpose of avoiding conflicts between state and federal courts having concurrent jurisdiction. This view finds support both in the rule itself and in the exceptions which have been carved out of it. As this Court said in *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 183-184:

The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal

²⁶ For the origin and early history of the statute, see Durfee and Sloss, *Federal Injunction against Proceedings in State Courts: The Life History of a Statute* (1932) 30 Mich. L. Rev. 1145; Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 Yale L. J. 1169.

courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States, *Ex parte Young*, 209 U. S. 123; *Truax v. Raich*, 239 U. S. 33; *Missouri v. Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538, 543; or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts, *French v. Hay*, 22 Wall. 250; *Julian v. Central Trust Co.*, 193 U. S. 93, 112; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 219; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214, 221; or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience, *Marshall v. Holmes*, 141 U. S. 589; *Ex parte Simon*, 208

U. S. 144; *Simon v. Southern Ry. Co.*, 236
 U. S. 115; *Public Service Co. v. Corboy*, 250
 U. S. 153, 160; *National Surety Co. v. State
 Bank of Humboldt*, 120 Fed. Rep. 593.

As this opinion shows, Section 265 has never been literally enforced according to its terms, but has always been interpreted so as to give effect to its purpose of "achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter." See *Hale v. Bimco Trading Co.*, 306 U. S. 375, 378. Section 265, then, is not to be interpreted simply by reading its words with the aid of a dictionary; it is rather to be construed in the light of the mischief which the statute was designed to avoid.

So construed, it is plain, we believe, that Section 265 is not applicable to the present case because the injunction granted by the court below does not involve any conflict between courts having concurrent jurisdiction. As we have already pointed out (pp. 55-58) the state court proceeding was a suit against the United States, and consequently, Congress not having consented to suit, the state court was without jurisdiction to entertain the proceeding. The jurisdiction of the District Court, on the other hand, cannot fairly be disputed (see Judicial Code § 24 (1), 28 U. S. C. § 41 (1)), and in the circumstances, that jurisdiction was exclusive. Therefore, the court below had the inherent power and duty to protect its exclusive jurisdiction by en-

joining any attempted interference therewith in the state courts. Section 265 is inapplicable because the state court lacked "potential jurisdiction over the same subject matter", a necessary prerequisite for the operation of the statutory bar. See *Hale v. Bimco Trading Co.*, 306 U. S. 375.

That Section 265 does not prevent the federal courts from enjoining parties to state court proceedings where the jurisdiction of the former is exclusive has long been recognized by this Court. *French v. Hay*, 22 Wall. 250; *Julian v. Central Trust Co.*, 193 U. S. 93, 112; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214, 221. And this rule has several times been applied by the lower federal courts to enjoin further prosecution of state court proceedings instituted against property of the United States. *United States v. Inaba*, 291 Fed. 416 (E. D. Wash.); *United States v. McIntosh*, 57 F. (2d) 573 (E. D. Va.); *United States v. Prince William County*, 9 F. Supp. 219 (E. D. Va.), affirmed, 79 F. (2d) 1007, certiorari denied, 297 U. S. 714. See pp. 71-75, *infra*.

Hale v. Bimco Trading Co., 306 U. S. 375, is persuasive authority in support of our position. There a petition for mandamus had been filed in the Supreme Court of Florida on the relation of a local cement company to compel the members of the State Road Department to enforce a statute providing for the inspection of all imported cement and the payment of an inspection fee. Subsequent to the granting of a peremptory writ in that proceeding, the Bimco Trading Company, a

non-Florida corporation, successfully instituted proceedings in a federal court to enjoin the enforcement of the statute on the grounds of unconstitutionality. This Court rejected the contention that Section 265 prevented issuance of the injunction, saying (pp. 377-378):

To invoke § 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. * * *

* * * [Section 265] is an historical mechanism * * * for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 183.

The present record presents no occasion for bringing this safeguard into play.

It is true that in the *Bimco* case the Florida court had avoided all friction between it and the federal court by staying its proceedings until this Court had passed upon the constitutional issue. But, while that procedure was not followed in the present case, there is still no question of possible fric-

tion between the federal and state courts, because, as we have shown, the state court was without jurisdiction.

One of the factors which motivated decision in the *Bimco* case was that, if the federal court action was not maintainable, there would be "no proceedings * * * available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement." (306 U. S. at 378.) That situation existed in the *Bimco* case because the officers of the state, having lost in the state court, could not have appealed to this Court to contest the constitutionality of a state statute which they were under a duty to enforce. *Columbus & Greenv. Ry. v. Miller*, 283 U. S. 96; *Stewart v. Kansas City*, 239 U. S. 14; *Brookton County Court v. West Virginia*, 208 U. S. 192. Precisely the same situation pertains here. No constitutional issue was raised in the state court proceeding and none, we submit, could have been raised by the Authority, since it is a creature of the state. See *Sheldon v. Grand River Dam Authority*, 182 Okla. 24, 28, 76 P. (2d) 355, 361-362. Consequently, to apply the bar of Section 265 here would mean that the constitutional rights of the United States could not have been presented to this Court had the state court proceedings been decided adversely to the Authority.

The essential similarity of this case to the *Bimco* case is thus apparent. In each instance, a party not joined in the state court proceedings was nev-

ertheless directly affected thereby (cf. *Chase National Bank v. City of Norwalk*, 291 U. S. 431); in each instance, application of Section 265 would have "bound the independent suitor in the federal court as though he were a party to the litigation in the state court," and would have prevented determination of his constitutional rights by this Court, in the event of an adverse decision by the state court (306 U. S. at 378); and in each instance the exercise of jurisdiction by the federal court involved no conflict with a state court having concurrent jurisdiction.

B. The lower federal courts have held, with one exception, that Section 265 does not apply to a case where the United States is suing to protect its own property interests. *United States v. Inaba*, 291 Fed. 416 (E. D. Wash.); *United States v. McIntosh*, 57 F. (2d) 573 (E. D. Va.); *United States v. Prince William County*, 9 F. Supp. 219 (E. D. Va.), affirmed 79 F. (2d) 1007, certiorari denied, 297 U. S. 714; *United States v. Babcock*, 6 F. (2d) 160 (D. Ind.), modified on other grounds, 9 F. (2d) 905 (C. C. A. 7th); *United States v. Dewar*, 18 F. Supp. 981 (D. Nev.).²⁷ In one sense, this rule is merely a corollary to the general principle, discussed above, that Section 265 applies only

²⁷ *United States v. Land Title Bank & Trust Co.*, 90 F. (2d) 970 (C. C. A. 3d); cited by appellants (Br. 46); is opposed. However, in *United States v. Central Stockholders' Corp.*, 52 F. (2d) 322 (C. C. A. 9th), also cited by appellants (Br. 46-47), the requested injunction was denied on grounds wholly unrelated to § 265.

where there is a potential conflict between federal and state courts having concurrent jurisdiction; whenever property rights of the United States are involved, the federal courts have exclusive jurisdiction (see pp. 67-68, *supra*) and consequently no conflict of jurisdiction is presented. In another sense, the rule reflects the accepted canon of statutory construction that the United States is not bound by the terms of a general statute unless specifically named therein. *United States v. Herron*, 20 Wall. 251; *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152.

In view of the decision in *United States v. Parkhurst-Davis Co.*, 176 U. S. 317, discussed below at pp. 75-76, we do not contend that Section 265 is inapplicable to every case to which the United States is a formal party. Our position is rather that it is inapplicable where the United States is the real party in interest, particularly where it is suing to protect its own property rights. As the Court has but recently observed, the rule that the United States is not bound by a general statute in which it is not named is of particular force where, as here, "an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest." *Nardone v. United States*, 302 U. S. 379, 383. Certainly, as applied to this case, Section 265, if not limited, would deprive the United States of an opportunity adequately to protect its property interests, and would, by preventing it from obtaining complete

and adequate relief, seriously jeopardize its rights.

The rule that the United States is not bound by a statute unless specifically mentioned therein "is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself" (*Nardone v. United States*, 302 U. S. 379, 383), and is not applied at all in the case of a "statute intended to prevent injury and wrong." *Ibid.*, at 384. But in this case, Section 265, if applied, would operate directly upon the sovereign, and its application would cause, not prevent, injury and wrong.

Even aside from this consideration, however, it is clear, both on principle and authority, that where the federal courts have exclusive jurisdiction, because property interests of the United States are involved, Section 265 does not prevent the granting of necessary injunctive relief. In *United States v. Inaba, supra*, an action had been commenced in a state court to foreclose a labor lien against crops of a tenant who had leased the land from the United States, as trustee for an Indian allottee, and a receiver had been appointed by the state court. Subsequently the United States brought suit in the federal court to foreclose a landlord's lien against the tenant and the crops. A temporary injunction restraining not only the parties to the state court action, but also the receiver appointed therein, was granted over the objection that Section 265 prohibited such relief. The court based its decision on the circumstance that the

United States was protecting a property interest, that it had not consented to be sued in the state court in respect to that property interest, and that therefore it could not be required to intervene in the state court for relief. Judge Webster said (pp. 418-420):

To compel the United States to go into the state courts for the protection of its property clearly would subject it to the jurisdiction of the state tribunals, precisely like any other litigant, and the consequence would be to force the government into a state court by indirection when this could not be accomplished by direction. * * * It follows, therefore, that the United States, having an interest in the property, may commence and maintain in its own courts such proceedings as may be necessary and appropriate to safeguard and protect its interests, even though such property prior thereto may have been brought within the jurisdiction of a state court for the purpose of adjudicating the rights of private litigants therein, over whom that court has acquired jurisdiction.

In *United States v. McIntosh, supra*, land had been purchased for a Marine Corps base. The defendants brought an action in ejectment in the state court against the officers in charge, without making the United States a party, on the ground that the property had not been properly acquired. The United States sued in the federal court to quiet title to the lands and to enjoin the defendants

from further prosecution of the ejectment suit in the state court. The court granted the injunction, pointing out that Section 265 was designed to prevent conflicts between the concurrent jurisdiction of state and federal courts, and did not apply to injunctions sought to protect the federal courts' exclusive jurisdiction.

United States v. Parkhurst-Davis Mercantile Company, 176 U. S. 317, relied upon by appellants, is distinguishable. There the United States sued in the federal courts to restrain the defendants from enforcing in the courts of Kansas certain claims against various Indians, and from seeking satisfaction of such claims out of the lands held by the Indians. The Circuit Court sustained a demurrer and dismissed the bill; that ruling was affirmed by this Court on the ground that Section 265 barred relief. In that case, however, the United States was not suing to protect its own property rights, or, indeed, as trustee for the Indians. As pointed out both in *United States v. Inaba, supra*, and *United States v. McIntosh, supra*, the Indians involved in the *Parkhurst* case were *sui juris*, had a fee title to the land, and were able to sue for their own protection. No contention could have been made, therefore, that the federal court had exclusive jurisdiction or that any limitation of Section 265 was necessary in order to protect the rights of the United States. Unlike the present case, the state court proceeding there involved was not in any

sense a suit against the United States, and consequently, as pointed out in *United States v. McIntosh, supra*, the Government's suit in the federal court appears to have lacked any substantial equity. We believe it evident, therefore, that the application of Section 265 in the *Parkhurst* case is not authority for its application here.

IV

THE PRESENT ACTION IS NOT A SUIT AGAINST THE STATE OF OKLAHOMA

Appellants argue (Br. 29-41) that the present action is a suit against the State of Oklahoma and that consequently the court below had no jurisdiction to entertain the proceeding; the suit, they contend, should have been brought in this Court under Section 233 of the Judicial Code (28 U. S. C. § 341). This contention cannot be sustained. The present action is simply one against state officers, purporting to act under state authority, who are invading interests protected by the federal Constitution. In no aspect is it a suit against the State of Oklahoma.

1. SO MUCH OF THE PRESENT ACTION AS SEEKS TO RESTRAIN THE IMPROPER USE OF MILITARY FORCE IS NOT A SUIT AGAINST THE STATE

On the martial law aspect of the case, *Sterling v. Constantin*, 287 U. S. 378, furnishes a conclusive answer. The Court there stated (287 U. S. at 393):

The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief [citing cases]. The Governor of the State, in this respect, is in no different position from that of other state officials [citing cases]. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction.

Since this decision, injunction suits against state Governors and other state officials in martial-law situations have been uniformly entertained in the federal District Courts.²⁸

2. SO MUCH OF THE PRESENT ACTION AS SEEKS TO ENJOIN THE FURTHER PROSECUTION OF THE STATE COURT PROCEEDING IS NOT A SUIT AGAINST THE STATE

The principle that a suit to enjoin state officers from taking action in violation of the guaranties of the federal Constitution is not a suit against the

²⁸ *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn.); *Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind.); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn.); *Joyner v. Browning*, 30 F. Supp. 512 (W. D. Tenn.); *Miller v. Rivers*, 31 F. Supp. 540 (M. D. Ga.) reversed as moot, 112 F. (2d) 439 (C. C. A. 5th); cf. *United States ex rel. Palmer v. Adams*, 26 F. (2d) 141 (D. Colo.), reversed as moot, 29 F. (2d) 541 (C. C. A. 8th).

state applies equally to the injunction against the state court proceeding.²⁹ As we have shown (pp. 16-17, *supra*), the use of military force and the institution of the state court proceeding were parts of the same plan and would have resulted in the same injury and in the same unconstitutional interference with the interests of the United States. In one aspect, state officials were enjoined from using military force while purporting to act under state authority; in the other, they were enjoined from invoking judicial assistance while purporting to act under state authority. In the one situation they set into motion the military forces of the state; in the other they caused the judicial machinery of the state to function. But whether the name of the state appears on the unfurled colors of the National Guard, or in the caption of a petition for injunctive relief, in either event the interference is

²⁹ The complaint as framed (R. 1, 2) was brought against the State Highway Commission as a party defendant, the Commission *eo nomine* having been one of the relators in the state court proceeding. At the time of the hearing on the appellants' motion to dismiss, however, the complaint was dismissed as to Commission, as such, and was continued only against its members (R. 228, 282-283). This was done to avoid any question that the action was one against the state, even though cases involving predecessor State Highway Commissions tended to show that a proceeding to restrain illegal action by the Commission is not a suit against the state. *Wentz v. Ingenthron*, 146 Okla. 165, 294 Pac. 154; *Wentz v. Dawson*, 149 Okla. 94, 299 Pac. 493; *State Highway Commission v. Younger*, 170 Okla. 614, 41 P. (2d) 686; *United States v. Board of Commissioners*, 54 F. (2d) 593 (C. C. A. 10th).

unconstitutional and an action to enjoin state officers from continuing that interference is not a proceeding against the state.

This is not novel doctrine. Ever since *Ex parte Young*, 209 U. S. 123, it has been settled that an injunction will lie to restrain state officials from further prosecution of an action, brought in a state court in the name of the state, where the effect of the action restrained would be to invade the constitutional rights of the complainant. See also *Truax v. Raich*, 239 U. S. 33, 37-38; *Missouri v. Chicago, B. & Q. R. R. Co.*, 241 U. S. 533, 543; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214. In *Ex parte Young*, the state court mandamus proceeding had for its object the enforcement of an unconstitutional state statute, which threatened to deprive certain railroads of their property without due process of law. In holding that a suit to restrain the prosecution of that proceeding was not one against the state, this Court said (209 U. S. at 159-160):

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsi-

bility to the supreme authority of the United States. * * *

The present case has all the essential features present in the *Young* case: the relators in the state court proceeding were undertaking unconstitutional action, the remedy of injunction was necessary to protect the complainants' interests, and the injunction was properly framed to enjoin only the litigants in the state court proceeding, without any attempt whatever to control the state court itself.

The circumstance that the state court mandamus action in the *Young* case was commenced after the institution of the federal suit for injunction (see 209 U. S. at 162), while here the federal action followed the state court proceeding, is not a distinction of substance insofar as the question of a suit against the state is concerned. Priority of jurisdiction, while a relevant consideration in determining questions of comity, is irrelevant in determining the character of the suit as one against the state. Furthermore, as we have pointed out, the rule of comity recognizing the prior rights of the court first acquiring jurisdiction will not be applied to bar relief to one who was not made a party to the earlier proceeding. *Chase Nat. Bank v. Norwalk*, 291 U. S. 431; *Hale v. Bimco Trading Co.*, 306 U. S. 375.

3. THERE WOULD HAVE BEEN NO JUSTIFICATION FOR INSTITUTEING AN ORIGINAL PROCEEDING IN THIS COURT UNDER SECTION 233 OF THE JUDICIAL CODE

In view of the clearly established jurisdiction, of the District Court, there would, we believe, have been no justification for the United States to have filed an original bill in this Court against the State of Oklahoma and its officials. The burden of this Court's appellate jurisdiction, and the necessity for proceeding in its original jurisdiction with the assistance of a master—a device better adapted to the leisurely tempo of boundary disputes and controversies over the apportionment of waters than to the martial array and immediate injury here involved—suggest in imperative fashion the duty of the law officers of the Government to bring before this Court only such cases lying within its original jurisdiction as are not under any conditions justiciable elsewhere.

This Court would, of course, have had jurisdiction over a suit brought by the United States against the State of ~~Alabama~~. *United States v. Oklahoma*, Arizona, 295 U. S. 174. But the Court has recently indicated that it regards the doctrine of *forum non conveniens* applicable to its original jurisdiction and that it will therefore refuse to hear cases which, although falling within its original jurisdiction, can be more conveniently disposed of in some other

forum. *Massachusetts v. Missouri*, 308 U. S. 1, 19-20. Here, considerations respecting the protection of the United States' property, equally with considerations involving the convenience of this Court, dictated that the present complaint be filed in the appropriate District Court.

V

THE CASE WAS PROPERLY HEARD BY A DISTRICT COURT OF THREE JUDGES

1. Section 266 of the Judicial Code (*infra*, pp. 118-120), provides that no interlocutory injunction "suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute * * * upon the ground of the unconstitutionality of such statute" shall be granted unless the application therefor be heard and determined by a district court of three judges.

The decisions of this Court and of the lower federal courts make clear that this provision is applicable to an action such as the present one, where relief is sought against the improper use of military force. *Sterling v. Constantin*, 287 U. S. 378; *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn.); *Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind.); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn.).

Sterling v. Constantin, *supra*, already discussed, differs in no material respect from the present

case. There the Governor of Texas, against whom injunctive relief was prayed for and obtained, had sought to justify his actions under the constitutional power to "cause the laws to be faithfully executed," and to call upon the militia to enforce the laws. In addition, he relied upon various statutory provisions authorizing him to call the militia into active service when he deemed such action necessary to enforce the laws of the state or to quell riots and disturbances. This Court upheld the jurisdiction of a three-judge court convened under Section 266 of the Judicial Code, saying (287 U. S. at 393-394):

As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. * * *

In the present case, the Governor of Oklahoma has acted ³⁰ under constitutional and statutory pro-

³⁰ While the Proclamation here recited only the Oklahoma Constitution (Govt. Exh. 1, R. 401), the appellants throughout have relied both upon the Constitution and statutes of the state. See pp. 90-91, *infra*. In any event, a

visions which do not differ in any material respect from those involved in the *Sterling* case. Okla. Const., Art. 6, §§ 2, 6, 8; Okla. Stat. 1931, § 4989. Accordingly, the decision in the *Sterling* case is direct authority in support of our position.

2. Appellants attempt to distinguish the *Sterling* case on the ground that here the complaint alleged only the unconstitutionality of the Governor's declaration of martial law, and of the action taken pursuant thereto, and did not further allege, as in the *Sterling* case, that the state Constitution and statutes, if they authorized such a declaration and such action, would likewise be unconstitutional. The attempted distinction is, we submit, untenable. Jurisdictional questions under Section 266 do not turn on mere verbal niceties; the substance of the issue tendered to the court, rather than the form factor. See *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 17; *Oklahoma Gas Co. v. Packing Co.*, 292 U. S. 386, 391. Thus, this Court has held that, even though a petition presents a case calling for the invocation of a three-judge court under Section 266, the court has no jurisdiction to proceed where it appears at the hearing that no substantial constitutional question is involved. *Oklahoma Gas Co. v. Packing Co.*, *supra*. The converse, we

state constitution is deemed to be a "state statute" within the meaning of Section 237 of the Judicial Code (see *Arkansas Southern Ry. v. Louisiana & Arkansas Ry.*, 218 U. S. 431) and there is no reason why any different construction should apply to Section 266.

submit, is equally true: where, as here, the constitutionality of a state statute is actually in issue (see pp. 90-91, *infra*), the case must be heard by a three-judge court even though the allegations of unconstitutionality in the complaint are directed towards the action taken by the defendants rather than to the statute under which the defendants acted.

Jameson & Co. v. Morgenthau, 307 U. S. 171, is persuasive authority against appellants' attempt to distinguish *Sterling v. Constantin*, *supra*, on the ground that the complaint there contained an allegation that, if the Governor's declaration of martial law were authorized by state statute, the statute was unconstitutional. In the *Jameson* case the complaint alleged that an administrative order, issued pursuant to a federal statute, was unconstitutional. It also alleged that, if the federal statute could be construed as authorizing the order, then the statute itself was unconstitutional.³¹ The case was brought before a three-judge court convened under the Act of August 24, 1937 (c. 654, 50 Stat. 752, 28 U. S. C. § 380 (a)), a provision analogous to Section 266, and the question was whether the case should have been heard by one judge or by three. This Court held, relying on the intent of Congress as reflected in the legislative history, that an injunction proceeding to restrain the enforcement of a federal administrative order

³¹ See Allegation 17, p. 16 of the record in *Jameson v. Morgenthau*, No. 717, October Term, 1938.

was not within the purview of the Act of August 24, 1937, and that the case was therefore not within the jurisdiction of a three-judge court. The cause was accordingly remanded.

This holding necessarily implies that, where the basic jurisdictional act, construed in the light of its legislative history, does not authorize a three-judge court for a suit attacking an administrative order, but only one where the attack is on the constitutionality of the underlying statute, then the mere additional allegation, "that the statute, if it authorizes the order complained of, is likewise unconstitutional," will not bring the case within the jurisdiction of a three-judge court. The converse must be equally true: where, as here, the attack on the constitutionality of a declaration of martial law is, as a matter of substance, within the competence of a three-judge court (see *Sterling v. Constantin, supra*), then the absence of the additional allegation—as to the unconstitutionality of the statute if it authorizes the challenged action—does not deprive the three-judge court of jurisdiction.

This has been the uniform ruling of the District Courts in other martial law cases. *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn.); *Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind.); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn.).³² In none of these cases, as shown by

³² *Joyner v. Browning*, 30 F. Supp. 512 (W. D. Tenn.) is distinguishable. That was a suit before a three-judge court to enjoin the Governor of Tennessee and other state officers

an examination we have made of the pleadings, was the complaint addressed to the unconstitutionality of the statute pursuant to which the declaration of martial law was issued, yet in each of them the jurisdiction of the three-judge statutory court was sustained.

3. *Oklahoma Gas Co. v. Russell*, 261 U. S. 290, also lends strong support to our position. In that case, the Court pointed out that Section 266, as originally enacted (c. 231, 36 Stat. 1087, 1162), prescribed a three-judge court only where injunctive relief was sought to restrain state officers from enforcing a state statute on the ground that it was unconstitutional and that not until two years later was the provision amended to include injunctions against enforcement of allegedly unconstitutional orders made by an administrative board or commission acting pursuant to a state statute (c. 160, 37 Stat. 1013). The Court stated that the amendment was superfluous since the original statute was broad enough to cover not only unconstitutional statutes but also unconstitutional adminis-

tration, *inter alia*, calling out the National Guard to influence a primary election and to prevent certain citizens from voting. The Tennessee Constitution expressly prohibits calling out the militia except after a declaration by the legislature that it is necessary to suppress rebellion or invasion. Tenn. Const. Art. III, § 5; see *Green v. State*, 15 Lea 708. Since there was no such declaration by the Tennessee legislature, it clearly appeared that the declaration of martial law by the Governor was illegal under state law and consequently no question was involved which called for the application of Section 266.

trative orders made pursuant to statute (261 U. S. at 292). By parity of reasoning, as shown by *Sterling v. Constantin, supra*, it is also broad enough to cover unconstitutional executive action taken pursuant to a state statute.

Certainly, as a matter of policy, there is no reason to distinguish between a situation such as that here presented and the case of an administrative order. The authority of an administrative agency to issue orders derives from statute and any order which it issues necessarily implies a finding that the statutory conditions for the order exist. Similarly, the Governor's power to order the National Guard on duty derives from statute³³ and his declaration of martial law implies a finding that the statutory conditions which justify such a declaration exist. Consequently, if, as *Oklahoma Gas Co. v. Russel* establishes, Section 286 applies to the case of unconstitutional administrative orders, even apart from the provision expressly covering such orders, it must also apply to an unconstitutional executive declaration of martial law.

Ex parte Bransford, 310 U. S. 354, relied upon by appellants, is not opposed. There this Court held that a three-judge court was not the proper forum for a case in which an assessment of bank

³³ Oklahoma Statutes 1931, § 4989, Okla. Stat. Ann. Title 44, § 66 authorizes the Governor to order the National Guard on duty "in case of war, invasion, insurrection, or breach of the peace, or imminent danger thereof, or any forcible obstruction of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary."

shares was alleged to be unconstitutional. The Court, after detailed analysis of the contentions of the complainant, determined that the gravamen of the complaint was that the assessment misinterpreted the applicable state statute and that, for purposes of the bill, the validity of the statute was admitted (310 U. S. at 360, 361). It therefore concluded that, "Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court * * *." (310 U. S. at 361). Here, on the other hand, there can be no contention that the United States admitted the validity of the state statute as applied by appellants; to the contrary, as shown below (pp. 90-91), the constitutionality of the statute was actually put in issue before the district court.

Nothing in *Ex parte Bransford* throws any doubt upon *Sterling v. Constantin*, *supra*, or upon the other martial law decisions cited above. To have held Section 266 applicable in the *Bransford* case would, in effect, have been to "turn this Court into a board of tax review." See *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 365. Here, on the other hand, as in the *Sterling* case, a totally different situation prevails. The Governor of a state has taken action which he claims to have been authorized by the constitution and statutes of the state and which has raised issues of large importance. To construe Section 266 as covering the case of unconstitutional administrative orders but

as excluding the case of such fundamental executive action as that here involved would, we believe, be a distortion of the Congressional purpose.

4. The circumstance that the effect of the declaration of martial law was local is immaterial. An administrative order is no less an administrative order because, for example, it affects rates in only one locality. The real criterion, for purposes of Section 266, is not whether enforcement of the statute or order is local, but whether the statute or order embodies a policy of state-wide concern. If it does, then the case falls within the competence of a three-judge court. *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 94; *Rorick v. Commissioners*, 307 U. S. 208, 212. Not only was the declaration of martial law here involved necessarily of state-wide concern, but, equally important, the statutory provision upon which it rested was of state-wide application.

5. Even should the court be of opinion that, on the basis of the complaint alone, the case did not call for an application of Section 266, nonetheless the case was properly heard by a three-judge court because the validity of the statutory provisions under which the Governor purported to act was actually put in issue. In their answer, filed April 10, 1940, appellants alleged that "the Governor had lawful authority to issue said proclamation by virtue of Sections 6 and 8, Article 6, Oklahoma Constitution, and Section 4989, Oklahoma Statutes, 1931" (par. 19) and that the proclamation

thus authorized was constitutional (par. 20).³⁴ Again, at the close of the hearing, appellants requested the court below to conclude, as a matter of law, that the declaration of martial law and the acts done thereunder were authorized by the constitution and statutes of Oklahoma and that neither the declaration nor the acts thus authorized contravened the federal Constitution (R. 236-237).

Since the constitutionality of the statutory provisions relied upon was thus put in issue, it seems plain that a single judge would have been without power to issue the injunction now challenged. By its very terms, Section 266 bars a single judge from taking such action. Therefore, regardless of the allegations of the complaint, the case was properly heard by a three-judge court.

While it is true that the determination of federal jurisdiction must be based upon the allegations of the complaint (*Mosher v. Phoenix*, 287 U. S. 29; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *Ex parte Poresky*, 290 U. S. 30); here the jurisdiction of the district court *qua* federal court is not in issue. That jurisdiction is sufficiently established by the allegation that the action is one brought by the United States. Jud. Code, § 24 (1); 28 U. S. C. § 41 (1). The issue here is simply whether the district court should have been com-

³⁴ Appellants' answer was inadvertently omitted from the designation of record and therefore does not appear in the printed record. It has, however, been certified by the court below to this Court and is on file in the office of the Clerk.

posed of one judge or of three. On that issue the complaint cannot be determinative since Section 266 does not lay down a particular requirement for pleading. To the contrary, it prohibits particular action on stated grounds, namely, the issuance of an injunction restraining the enforcement or operation of a state statute because of unconstitutionality. As this Court has pointed out, the requirements of Section 266 go to substance and do not leave it in the power of the pleader to decide whether his case shall be heard by one judge or three. *Stratton v. St. Louis S. W. Ry., supra*; *Oklahoma Gas Co. v. Packing Co., supra*; cf. *Jameson & Co. v. Morgenthau, supra*. In the present case, the issues actually raised at the trial effectively removed the cause from the competence of a single judge; thereafter the injunction issued below could only have been granted, as in fact it was, by a district court of three judges.

6: Should the Court be of opinion, despite the foregoing arguments, that appellants' contentions with respect to Section 266 are sound, then, under the established practice, the cause would be remanded to the District Court. See *Garment Workers v. Donnelly*, 304 U. S. 243, 251.³⁵ There the

³⁵ In the *Donnelly* case, the District Judge who originally heard the case (see 20 F. Supp. 767) dissented from the findings and conclusions of the three-judge court. 21 F. Supp. 807, 817. In the instant case, however, the three judges composing the district court concurred in all the findings and conclusions (R. 262), all three signed the injunction now assailed (R. 264), and all concurred in the interlocutory

United States would move to amend its complaint by adding the verbalism which, on the assumption *arguendo* that appellants are right, is required to bring the case within Section 266. If the amendment were permitted, as we believe it clearly would be (see Rule 15 (a), F. R. C. P.), the case would immediately be back in this Court.

It was to avoid such unnecessary shuttling back and forth that Rule 15 (b), F. R. C. P., was promulgated. That rule, insofar as here material, reads as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Since the validity of the statutory provisions under which the Governor acted was actually in issue, we believe that, if any amendment of the complaint is necessary, it should be permitted at this time. No substantial rights of appellants would be affected by such an amendment and unnecessary

rulings made in the course of the hearing (R. 283, 399). In these circumstances the decree entered is a valid one in any event. See *Cannonball Transportation Co. v. American Stages*, 53 F. (2d) 1050, 1051 (S. D. Ohio).

procedural steps would be avoided. Moreover, it should be remembered that this is not an appeal from a final judgment or decree, but from a preliminary injunction. The case being in this fluid condition, liberality in permitting any amendment that may be deemed necessary is plainly desirable.

VI

THE CASE IS NOT MOOT

In the Statement (*supra* pp. 19-20) we called attention to facts, not apparent of record or formally suggested to the Court, indicating that the physical condition of the Grand River is different from what it was at the time of the hearing below.

This change in the physical situation has rendered the controversy anything but moot. The completion of the dam has rendered even more serious the threat to its destruction; and the threat to its destruction today is as powerful as it was at the time of hearing, tempered somewhat perhaps by lapse of time, and to date rendered harmless by the order of the court below.

The clearest evidence that the controversy is not moot is to be found in the position which is asserted by the state officers on this appeal. They continue to maintain the propriety of their action both in respect of the declaration of martial law

and the prosecution of the state court proceedings. On behalf of the Governor it is asserted that his duty called for just such action as was taken by him. Presumably, therefore, should the injunction before this Court be dissolved, he will deem it appropriate to pursue just such action further. Though the construction of the dam is completed, clearly through the same instruments heretofore used, through martial law and a state court proceeding, the property interests of the United States may still be destroyed or at least substantially impaired.

Upon considering the determined and unlawful scheme and plan of the appellants out of which the case arose, and the justification and imperative necessity for the issuance of the injunction, we are convinced that no pious disavowal of purpose to carry the scheme to ultimate consummation (and there has been no disavowal) could remove the threat and render the controversy moot.

In this background of past misconduct, nothing short of consent by the defendants to a decree making permanent the preliminary injunction granted below could allay reasonable fear of misconduct for the future—and that is the test of whether a threat still inheres in the situation. *A fortiori*, where the state court suit has not been dismissed

and the martial law proclamation has not been revoked, any claim of mootness would be without substance. See *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *National Labor Relations Board v. Greyhound Lines*, 303 U. S. 261, 271.

Not only is the controversy itself still a live one for judicial cognizance, but the provisions of the preliminary injunction actually granted (and also of the permanent injunction prayed for) continue to have an important office to serve. Specifically, the effect upon the decree of the changed conditions now obtaining is as follows:

(1) Paragraphs (a), (e), and (f) of the preliminary injunction (R. 263), which restrain interference with the closing or completion of the dam, have not, by reason of the changed circumstances, spent their force. To the extent that the command of these paragraphs related to the original closing and completion of the dam they are, of course, executed. But they command more. Can it seriously be argued that these paragraphs alone would be insufficient basis for a contempt proceeding were the defendants tomorrow to cause destruction of the dam or to require its reopening? "Close" means close and keep closed. Only the narrowest literalism could render these paragraphs executed.

(2) Paragraphs (g) and (h) of the injunction (R. 263-264), which enjoin any interference with the Authority's performance of the covenants con-

tained in the indenture and in the loan and grant agreement are not moot, because those covenants relate to operation as well as to construction, and operation is obviously still *in futuro*. The same is true of paragraph (i), which enjoins the appellants "from taking any action which will injure or tend to injure the property rights or the security of the United States" in the dam. These portions of the decree are a necessary safeguard against future interference with the dam by appellants, such as forcing the Authority to open the penstocks and drain the lake and thus to lose at least a year's power revenues. See Fdg. 36, R. 251.

(3) Paragraph (d) of the injunction (R. 263), which restrains the use of military force pursuant to the declaration of martial law, is also not moot. See *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384, and cases there cited. The declaration of martial law has not been revoked (Fdg. 55, R. 254), and neither the Governor nor the Adjutant General ~~has~~ ever disclaimed either their right or their intention to order the troops back to the dam-site (Fdg. 56, R. 254).

(4) Paragraphs (b) and (c) of the injunction (R. 263), which enjoin appellants from further prosecuting the state court proceeding, from attempting to enforce or to receive any benefits of the restraining order therein granted, from applying for a renewal of the restraining order, and from commencing other proceedings seeking the same or similar relief, are likewise not moot. The state

court proceedings, and the restraining order granted therein, were directed against the closing and completion of the dam. When the restraining order lapsed, and after the present suit was commenced, the dam was closed and completed. If now the present suit were dismissed, and the injunction dissolved, appellants would be free to move in the state court proceeding for an order directing the Authority either to open or partially to destroy the dam. This follows from the familiar principle that "where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the act sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*." *Texas & N. O. R. R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475, 479; *Jones v. Securities & Exchange Comm.*, 298 U. S. 1, 15-18. Thus the danger sought to be averted would once more be present, and the United States' property interests correspondingly jeopardized.

There is nothing in the record, in any subsequent facts, or in appellants' brief to justify any inference that either the *locus penitentiae* or the changes in the physical condition of the dam since hearing below has detracted an iota from the Government's need for injunctive relief, let alone to establish the mootness of the controversy.

CONCLUSION

The order of the District Court entering a preliminary injunction should be affirmed.

Respectfully submitted.

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JANUARY 1941.

APPENDIX

Grand River Dam Authority Act, Article 4, Chapter 70, Oklahoma Session Laws of 1935, as amended:

AN ACT creating a Conservation and Reclamation District to be known as Grand River Dam Authority in accordance with and by the authority set forth in Section 31, of Article 2, of the Constitution of the State of Oklahoma, and to be a governmental agency, body politic and corporate, without power to mortgage or incumber any of its property or to alienate any of its property necessary to its business, or to levy taxes or assessments or to create any indebtedness payable out of taxes or assessments, or to pledge the credit of the State; fixing the boundaries thereof; conferring thereon certain powers, rights, privileges, and functions, including the power to control, store, preserve, use, distribute and sell the water of the Grand River and its tributaries, to develop, generate, distribute, and sell water power and electric energy, to acquire property by condemnation or otherwise, to construct, maintain, use and operate facilities, to make contracts, to borrow money, to create and issue its negotiable bonds for cash, property, or refunding purposes on stated terms and conditions, and in connection therewith to pledge all or any part of its revenues; vesting the powers of the District in a Board of Directors and prescribing the manner of their appointment and their duties; providing for the appointment of officers and their qualifications, agents, and employees; providing for the fiscal management of the district; preserving existing water rights to the extent provided; prescribing all necessary details; providing that if any provision of this Act shall be held to be invalid, the validity of the other provisions thereof shall not be affected.

*Be it enacted by the People of the State of
Oklahoma:*

SECTION 1. GRAND RIVER DAM AUTHORITY.

There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority" (hereinafter called the District), and consisting of that part of the State of Oklahoma which is included within the

boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Tulsa, Wagoner, Sequoyah, McIntosh, Creek, and Okmulgee. Such District shall be, and is hereby declared to be a governmental agency, body politic, and corporate, with powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation, and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of the forests, water, and hydro-electric power of the State of Oklahoma.

(a) Nothing in this Act or in any other Act of law contained, however, shall be construed as authorizing the District to levy or collect taxes or assessments, or to create any indebtedness payable out of taxes or assessments, or in any manner to pledge the credit of the State of Oklahoma, or any subdivision thereof. [As amended by Article 2, Chapter 70, Oklahoma Session Laws of 1937.]

SECTION 2. POWERS, RIGHTS AND PRIVILEGES.

The District shall have and is hereby authorized to exercise the following powers, rights and privileges:

(a) To control, store and preserve, within the boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;

(b) To develop and generate water power and electric energy within the boundaries of the District;

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Grand River and its tributaries;

(d) To forest and reforest and to aid in the foresting and reforesting of the watershed area of the Grand River and its tributaries and to prevent and to aid in the prevention of soil erosion and floods within said watershed area;

(e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any Kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;

(f) To acquire by condemnation any and all property of any Kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;

(g) Subject to the provision of this Act from time to time sell or otherwise dispose of any property of any Kind, real, personal, or mixed, or any interest therein, which shall not be necessary to the carrying on of the business of the District;

(h) To overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this Act: Provided, that said District shall be liable in damages to the State of Oklahoma and/or any subdivision

thereof for any injury occasioned or expense incurred by reason thereof.

(i) To construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained, and reconstructed, and to use and operate any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions;

(j) To sue and be sued in its corporate name;

(k) To adopt, use and alter a corporate seal;

(l) To make bylaws for the management and regulation of its affairs;

(m) To appoint officers, agents, and employees, to prescribe their duties and to fix their compensation;

(n) To make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act;

(o) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing to borrow money and accept grants from the United States of America; or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to make and issue its negotiable bonds for moneys borrowed, in the manner and to the extent provided in Section 10. Nothing in this Act shall authorize the issuance of any bonds, notes or other evidences of indebtedness of the District, except as specifically provided in this Act, and no issuance of bonds, notes or other evidences of in-

debtedness of the District, except as specifically provided in this Act, shall ever be authorized except by an Act by the Legislature;

(p) To do any and all other acts or things necessary or convenient to the exercise of the powers, rights, privileges or functions conferred upon it by this Act or any other Act or law. Provided said District shall be liable for all damage caused by said District, its agents, servants and employees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged and said damages may be determined by appropriate action in the same manner as provided by law under the conservancy act of the State of Oklahoma.

Provided, however, That in the course of exercising its powers as herein enumerated the said District shall at all times consider the rights and needs of the people living within and upon the land lying within the watershed of the Grand River and its tributaries above the District; *Provided, however,* That nothing herein shall prevent the District from selling for irrigation purposes within the boundaries of the District any water impounded by it under authority of law, provided that nothing herein contained shall authorize the State to engage in agriculture except for Educational and Scientific purposes and for the support of its penal, charitable and educational institutions.

SECTION 3. BOARD OF DIRECTORS.

The powers, rights, privileges, and functions of the district shall be exercised by a

board of five (5) directors (herein called the Board), all of whom shall be residents of and freehold property taxpayers in the district; providing that not more than one of such directors shall be residents of the same county; provided, that no person shall be eligible for such appointment if he has, during the preceding ~~three~~ (3) years before his appointment, been employed by any utility company of any kind or character whatsoever whether publicly or privately owned; provided, however, that nothing in this Act shall be construed to prevent the appointment or service upon said Board by any of the present members of said Board; provided further, that no person holding a federal, state, county, city or town office, elective or appointive, shall be eligible to serve as a member of the Board of Directors. And provided, further, that such director shall have lived in said district five (5) years prior to his appointment. All of the directors shall be appointed by the Governor of the State of Oklahoma. The Governor shall appoint two (2) directors for a term expiring January 1, 1941, two (2) for a term expiring January 1, 1943, and one (1) for a term expiring January 1, 1945. At the expiration of the term of any director, another director shall be appointed by the same authority which appointed the director whose term has expired and this appointment shall be for a term of six (6) years.

Each director shall hold office until the expiration of term for which appointed and thereafter until his successor shall have been appointed and qualified, unless sooner removed as in this Act provided. Any director may be removed by the Governor for inefficiency, neglect of duty, or misconduct in office, after ten days' written notice has

been given said director. A vacancy resulting from a death or resignation, or for any other cause, shall be filled for the unexpired term of such director by the same authority which appointed him.

[As amended by Section 1, Article 1, Chapter 70, Oklahoma Session Laws of 1939.]

* * * * *

SECTION 8. RATES AND CHARGES—FEES.

The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:

(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c), and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire (by purchase and cancellation or redemption) bonds issued under this Act, or apply the same to any corporate purpose.

It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c), and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged.

SECTION 9. DISCHARGE OF LIABILITIES—BONDS.

Any and every indebtedness, liability, or obligation of the District, for the payment of money, however entered into or incurred, and whether arising from contract, implied contract, or otherwise, shall be payable solely (1) out of the revenues received by the District in respect of its properties, subject to any prior lien thereon conferred by any resolution or resolutions theretofore adopted as in this Act provided; authorizing

the issuance of bonds or (2), if the Board shall so determine, out of the proceeds of sale by the District of bonds payable solely from such revenues.

SECTION 10. BOND ISSUE AUTHORIZED—ACTIONS
ON BONDS.

The District shall have power and is hereby authorized to issue from time to time, bonds as herein authorized for any corporate purpose, not to exceed Twenty-five Million (\$25,000,000) Dollars in aggregate principal amount; provided, that an amount of such bonds in aggregate sum of Ten Million (\$10,000,000) Dollars is authorized to enable the construction of dams at or near Markham Ferry and Fort Gibson and transmission lines at or near the location sites of said dams as shown in Document No. 107 of the First Session of the Seventy-sixth Congress, and for the purposes of further rural electrification within the district after the completion of the dams; provided further, that the construction and completion of the Markham Ferry and Fort Gibson dams shall be in accordance with all the provisions of Article 4, Chapter 70, Session Laws, 1935, as amended by Article 2, Chapter 70, Session Laws, 1937, relating to the Pensacola Dam. Any additional amount of bonds must be authorized by an Act of the legislature. Such bonds may either be (1) sold for cash, at public or private sale, at such price or prices as the Board shall determine, provided that the interest cost of the money received therefor, computed to maturity in accordance with standard bond tables in general use by banks and insurance companies, shall not exceed six per centum per annum, or (2) may be issued

on such terms as the Board shall determine in exchange for property of any kind, real, personal, or mixed, or any interest therein which the Board shall deem necessary or convenient for any such corporate purpose, or (3) may be issued in exchange for like principal amounts of other obligations of the District, matured or unmatured. The proceeds of sale of such bonds shall be deposited in such bank or banks or trust company or trust companies, and shall be paid out pursuant to such terms and conditions, as may be agreed upon between the District and the purchasers of such bonds. All such bonds shall be authorized by resolution or resolutions of the Board concurred in by at least three of the members thereof, and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates (not exceeding six per centum (6%) per annum, payable annually or semi-annually, in such denominations, be in such form, either coupon or registered, carry such registration privileges as to principal only or as to both principal and interest, and as to exchange of coupon bonds for registered bonds or vice versa, and exchange of bonds of one denomination for bonds of other denomination, be executed in such manner and be payable at such place or places within or without the State of Oklahoma, as such resolution or resolutions may provide. Any resolution or resolutions authorizing any bonds may contain provisions, which shall be part of the contract between the District and the holders thereof from time to time (a) reserving the right to redeem such bonds at such time or times in such amounts and at such prices, not exceeding one hundred and five per centum of the principal amount thereof, plus accrued interest, as may be provided, (b)

providing for the setting aside of sinking funds or reserve funds and the regulation and disposition thereof, (c) pledging to secure the payment of the principal of and interest on such bonds and of the sinking fund or reserve fund payments agreed to be made in respect of such bonds all or any part of the gross or net revenues thereafter received by the District in respect of the property, real, personal, or mixed, to be acquired and/or constructed with such bonds or the proceeds thereof, or all or any part of the gross or net revenues thereafter received by the District from whatever source derived, (d) prescribing the purposes to which such bonds or any bonds thereafter to be issued, or the proceeds thereof, may be applied, (e) agreeing to fix and collect rates and charges sufficient to produce revenues adequate to pay the items specified in Subdivisions (a), (b), (c) and (d) of Section 8 hereof, and prescribing the use and disposition of all revenues, (f) prescribing limitations upon the issuance of additional bonds and upon the agreements which may be made with the purchasers and successive holders thereof, (g), with regard to the construction, extension, improvement, reconstruction, operation, maintenance and repair of the properties of the District and carrying of insurance upon all or any part of said properties covering loss or damage or loss of use and occupancy resulting from specified risks, (h) fixing the procedure, if any, by which, if the District shall so desire, the terms of any contract with the holders of such bonds may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given, (i) for the execution and delivery by the District to a

bank or trust company authorized by law to accept trusts, or to the United States of America or any officer or agency thereof, of indentures and agreements for the benefit of the holders of such bonds setting forth any or all of the agreements herein authorized to be made with or from the benefit of the holders of such bonds and such other provisions as may be customary in such indentures or agreements; and (j) such other provisions, not inconsistent with the provisions of the Act, as the Board may approve.

Any such resolution and any indenture or agreement entered into pursuant thereto may provide that in the event that (a) default shall be made in the payment of the interest on any or all bonds when and as the same shall become due and payable, or (b) default shall be made in the payment of the principal of any or all bonds when and as the same shall become due and payable, whether at the maturity thereof, by call for redemption or otherwise, or (c) default shall be made in the performance of any agreement made with the purchasers or successive holders of any bonds, and such default shall have continued such period, if any, as may be prescribed by said resolution in respect thereof, the trustee under the indenture or indentures entered into in respect of the bonds authorized thereby, or, if there shall be no such indenture, a trustee appointed in the manner provided in such resolution or resolutions by the holders of twenty-five per centum in aggregate principal amount of the bonds authorized thereby and at the time outstanding may, and upon the written request of the holders of twenty-five per centum in aggregate principal amount of the bonds authorized by such resolution or reso-

lutions at the time outstanding, shall, in his or its own name, but for the equal and proportionate benefit of the holders of all of such bonds, and with or without possession thereof;

(1) By mandamus or other suit, action or proceeding at law or in equity, enforce all rights of the holders of such bonds,

(2) Bring suit upon such bonds and/or the appurtenant coupons,

(3) By action or suit in equity, require the district to account as if it were the trustee of an express trust for the bondholders,

(4) By action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such bonds, and/or,

(5) After such notice to the District as such resolution may provide, declare the principal of all of such bonds due and payable, and if all defaults shall have been made good, then with the written consent of the holder or holders of twenty-five per centum in aggregate principal amount of such bonds at the time outstanding, annul such declaration and its consequence; provided, however, that the holders of more than a majority in principal amount of the bonds authorized thereby and at the time outstanding by instrument or instruments in writing delivered to such trustee have the right to direct and control any and all action taken or to be taken by such trustee under this paragraph. Any such resolution, indenture or agreement may provide that in any such suit, action, or proceeding, any such trustee, whether or not all of such bonds shall have been declared due and payable, and with or without possession of any thereof, shall be entitled as of right to the appointment of a receiver who may enter and take possession

of all or any part of the properties of the District and operate and maintain the same, and fix, collect, and receive rates and charges sufficient to provide revenues adequate to pay the items set forth in subparagraphs (a), (b), (c), and (d) of Section 8 hereof, and the costs and disbursements of such suit, action, or proceeding, and to apply such revenues in conformity with the provisions of this Act, and the resolution or resolutions authorizing such bonds. In any suit, action or proceeding by any such trustee, the reasonable fees, counsel fees and expenses of such trustee and of the receiver or receivers, if any, shall constitute taxable disbursements and all costs and disbursements, and all costs and disbursements allowed by the court shall be a first charge upon any revenues pledged to secure the payment of such bonds. Subject to the provisions of the Constitution of the State of Oklahoma, the courts of the County of Craig, or other county wherein the domicile may be situated, shall have jurisdiction of any such suit, action or proceeding by any such trustee on behalf of the bondholders and of all property involved therein. In addition to the powers hereinabove specifically provided for, each such trustee shall have and possess all powers necessary or appropriate for the exercise of any thereof, or incident to the general representation of the bondholders in the enforcement of their right.

Before any bonds shall be sold by the District, a certified copy of the proceedings for the issuance thereof, including the form of such bonds, together with any other information which the Attorney General of the State of Oklahoma may require, and shall be submitted to the Attorney General, and if he shall find that such bonds have been is-

sued in accordance with law, and if he shall approve such bonds, he shall execute a certificate to that effect which shall be filed in the office of the Auditor of the State of Oklahoma and be recorded in a record kept for that purpose. No bonds shall be issued until the same shall have been registered by the Auditor, who shall so register the same if the Attorney General shall have filed with the Auditor his certificate approving the bonds and the proceedings for the issuance thereof as hereinabove provided. All bonds approved by the Attorney General as aforesaid, and registered by the Auditor as aforesaid, and issued in accordance with the proceedings so approved shall be valid and binding obligations of the District and shall be incontestable for any cause from and after the time of such registration. [As amended by Article 2, Chapter 70, Oklahoma Session Laws of 1939.]

SECTION 11. BONDS NEGOTIABLE INSTRUMENTS.

All bonds issued by the District pursuant to the provisions of this Act shall constitute negotiable instruments within the meaning of The Negotiable Instruments Law.

SECTION 12. CONTRACTS WITH FEDERAL AGENCIES.

The District may, but without intending by this provision to limit any powers of the District as granted to it by this Act, enter into and carry out such contract, or establish or comply with such rules and regulations concerning labor and materials and other related matters in connection with any project or projects as the District may deem desirable or as may be requested by the United States of America, or any corpora-

tion or agency created, designated or established thereby, which may assist in the financing of any such project or projects. The District shall have the authority to request engineering aid of the Corps of Engineers of the United States Army, the Federal Power Commission, or any other Federal agency, in the designing and construction of any project authorized under the terms of this Act and to use such aid, if and when offered, and to pay any reasonable cost therefor.

SECTION 13. DISTRICT MAY PURCHASE BONDS.

The District shall have power out of any funds available therefor to purchase any bonds issued by it at a price not exceeding the redemption price applicable at the time of such purchase, or if such bonds shall not be redeemable, at a price not exceeding the principal amount thereof plus accrued interest. All bonds so purchased shall be cancelled and no bonds shall ever be issued in lieu thereof.

SECTION 14. ENCUMBRANCES PROHIBITED.

Nothing in this Act shall be construed as authorizing the District and it shall not be authorized to mortgage or otherwise encumber any of its property of any kind, real, personal, or mixed, or any interest therein, or to acquire any such property or interest subject to a mortgage or conditional sale, provided that this section shall not be construed as preventing the pledging of the revenues of the District as herein authorized. Nothing in this Act shall be construed as authorizing the sale, lease, or other disposition of any such property or interest of the District by the District, or any receiver of

any of its properties or through any court proceeding or otherwise, provided, however, that the District may sell for cash any such property or interest in an aggregate value not exceeding the sum of Fifty Thousand (\$50,000.00) Dollars in any one year if the Board, by the affirmative vote of six of the members thereof shall have determined that the same is not necessary or convenient to the business of the District and shall have approved the terms of any such sale, it being the intention of this Act that except by sale as in this section expressly authorized, no such property or interest shall ever come into the ownership or control, directly or indirectly, of any person, firm, or corporation, other than a public authority created under the laws of the State of Oklahoma. All property of the District shall be at all times exempted from forced sale, and nothing in this Act contained shall authorize the sale of any of the property of the District under any judgment rendered in any suit, and such sales are hereby prohibited and forbidden.

* * * * *

SECTION 16. BONDS EXEMPT FROM TAXATION.

All bonds and the interest thereon issued pursuant to the provisions of this Act shall be exempt from taxation (except inheritance taxes) by the State of Oklahoma or by any municipal corporation, county or other political subdivision or taxing district of the state.

SECTION 17. BONDS AUTHORIZED.

This Act without reference to other statutes of the State of Oklahoma shall constitute full authority for the authorization and

issuance of bonds, hereunder, and no other Act or law with regard to the authorization or issuance of obligations or the deposit of the proceeds thereof, or in any way impeding or restricting the carrying out of the acts herein authorized to be done shall be construed as applying to any proceedings taken hereunder or acts done pursuant hereto.

SECTION 18. CONSTRUCTION OF ACT.

This Act and all of the terms and provisions hereof shall be liberally construed to effectuate the purposes set forth herein.

SECTION 19. SAME.

If any provision of this Act or the application thereof to any person or circumstance shall be held to be invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SECTION 20. CITATION OF ACT.

This Act may be cited as the Grand River Dam Authority Act.

SECTION 21. EXPIRATION DATE.

The terms of this Act, and the authority herein created shall expire on the 1st day of July, 1939, unless some part of the project set forth herein has been commenced by said date, otherwise to be in full force and effect. [As amended by Article 1, Chapter 70, Oklahoma Session Laws of 1937.]

Judicial Code § 265, 28 U. S. C. § 379:

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except

in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Judicial Code § 266, as amended, 28 U. S. C.
§ 380:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the

attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the

State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.

Constitution of Oklahoma, Article 6:

SEC. 2. The supreme Executive power shall be vested in a Chief Magistrate, who shall be styled "The Governor of the State of Oklahoma."

SEC. 6. The Governor shall be commander-in-chief of the militia of the State, except when in service of the United States, and may call out the same to execute the laws, protect the public health, suppress insurrection, and repel invasion.

SEC. 8. The Governor shall cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States, and he shall be a conservator of the peace throughout the State.

Oklahoma Statutes, 1931, § 4989; Okla. Stat. Ann. title 44, § 66:

It shall be the duty of the Governor and he is authorized and required in case of war, invasion, insurrection, or breach of the peace, or imminent danger thereof, or any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary, to order on duty the national guard or any part thereof. No member thereof who shall be

ordered out for such duty shall be liable for civil prosecution for any act done by him in the discharge of his military duty on such occasion, and when the President of the United States shall make a call or requisition for troops, the Governor shall first order into the service of the United States the organization and arms of the service specified in said requisition.

Whenever the National Guard or any part of it is ordered on active duty, the officers and men shall receive the same pay and allowance as provided in the United States Army.

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SUPREME COURT OF THE UNITED STATES.

No. 201.—OCTOBER TERM, 1940.

Leon C. Phillips, Individually and as Governor of the State of Oklahoma, et al., Appellants, vs. The United States of America, et al.	} Appeal from the District Court of the United States for the Northern District of Oklahoma.
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[February 3, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

As part of a flood control and hydro-electric development, the Grand River Dam Authority, an agency of the State of Oklahoma, was empowered to construct the Grand River Dam, with authority to borrow money and accept grants from the United States. Oklahoma Laws of 1935, Art. 4, c. 70. For the construction of the dam the United States allotted twenty million dollars to the Authority. Eight and one-half millions, in round numbers, were to be used as a grant, and eleven and one-half for the bonds of the Authority. Construction began in February, 1936, and by the spring of last year much of the work was nearing completion. During this period, the Governor of Oklahoma unsuccessfully pressed against the Authority claims for the flooding of roads within the dam area. The action which the Governor finally took to enforce his own views in this matter is the source of the present litigation. On March 13, 1940, he declared martial law in an area surrounding part of the dam-site and ordered the Adjutant General of the state to occupy it. The following day the Governor in conjunction with other state officials obtained an *ex parte* order in a state court restraining further work on the dam by the Authority. Thereupon the United States began the present suit in a federal district court. A temporary order was issued against the Governor and the other officials restraining them from interference with the Grand River project by further prosecution of their suit in the state court and by the use of military force. Deeming the suit to be one arising under § 266 of the Judicial Code as amended, 28 U. S. C. § 380, a district court

of three judges was convened which, after hearing, entered an interlocutory injunction in the terms of the temporary restraining order. This is the decree that is now before us.

But unless § 266 required the present suit to be heard by three judges, under the Jurisdictional Act of 1925 we are without authority to entertain this direct appeal from a district court. § 238 of the Judicial Code as amended, 28 U. S. C. § 345. Having concluded that there is a fatal bar to our entertaining the appeal, we are without power to consider the other issues that were argued here.

By § 266, which is set forth in the margin,¹ Congress provided an exceptional procedure for a well-understood type of controversy. The legislation was designed to secure the public interest in "a limited class of cases of special importance". *Ex parte Collins*, 277 U. S. 565, 567. It is a matter of history that this procedural device was a means of protecting the increasing body of state legis-

¹ Judicial Code § 266, as amended, 28 U. S. C. § 380:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been

lation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate jurisdiction. *et. Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 321. The history of § 266 (see Pogue, *State Determination of State Law*, 41 Harv. L. Rev. 623, and Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795), the narrowness of its original scope, the piece-meal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. 1013, and Act of February 13, 1925, 43 Stat. 936, amending § 238 of the Judicial Code), the close construction given the section in obedience to Congressional policy (see, for instance, *Moore v. Fidelity & Deposit Co.*, *supra*; *Smith v. Wilson*, 273 U. S. 388; *Ex parte Collins*, *supra*; *Oklahoma Gas Co. v. Packing Co.*, 292 U. S. 386; *Ex parte Williams*, 277 U. S. 267; *Ex parte Public National Bank*, 278 U. S. 101; *Rorick v. Commr's*, 307 U. S. 208; *Ex parte Bransford*, 310 U. S. 354), combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to

brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Each stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an “administrative board or commission”. The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state’s legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.

To the test of this principle must be put the argument that the present case is within § 266.

The Oklahoma constitution has the customary provisions pertaining to the powers of a governor. In him is lodged “The Supreme Executive power”, he is “Commander-in-Chief of the militia of the State” and he “shall cause the laws of the State to be faithfully executed”. Constitution of Oklahoma, Article VI, §§ 2, 6, 8. Defining with particularity these powers, an Oklahoma statute “authorized and required” its Governor to call out the national guard in case of war or similar contingencies including “any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary”. Oklahoma Statutes, 1931, § 4989; Okla. Stat. Ann. Title 44, § 66. In its complaint the United States did not impugn the validity of these Oklahoma provisions. But the Governor justified his declaration of martial law under their authority, and since his action is deemed a lawless interference with the Government’s constitutional rights, the suit is claimed to be an “application for” an “interlocutory injunction . . . restraining the enforcement, operation, or execution of” a “statute of a State by restraining the action of any officer of such State in the enforcement or execution of such a statute . . . upon the ground of the unconstitutionality of such statute.”

The claim proves too much. Probably most of the actions of governors trace back to the common provision charging them with taking care that the laws be faithfully executed. Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional

scheme of § 266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a "statute", within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. As Mr. Justice Cardozo said of a related problem affecting the business of the federal courts, "we do not travel back so far." *Gully v. First Nat. Bank*, 299 U. S. 109, 116.

On its face, § 266 precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct. The special procedure only attends "the application for" an interlocutory injunction restraining enforcement of a statute. In other words, the complainant must seek to forestall the demands of some general state policy, the validity of which he challenges. No one questions Oklahoma's authority to give her Governor "Supreme Executive power" nor to make him Commander-in-Chief of her militia. What is here challenged is a single, unique exercise of these prerogatives of his office. This view is reinforced by the proviso added to § 266 by the Act of March 4, 1913, 37 Stat. 1013, whereby suit in a federal court against the enforcement of a statute can be stayed if appropriate provision is made for testing its validity in the state courts. Of course, a suit cannot be brought in the court of a state to enforce a governor's declaration of martial law. In short, this is not a case for which the procedural structure of § 266 was devised. If the Governor's action is subject to restraint in the District Court, the procedural road to be taken is the normal course of litigation in a federal district court and not the short cut of § 266.

Sterling v. Constantin, 287 U. S. 378, which is invoked as a precedent, was a very different case. There martial law was employed in support of an order of the Texas Railroad Commission limiting production of oil in the East Texas field. The Governor was sought to be restrained as part of the main objective to enjoin "the execution of an order made by an administrative . . . commission", and as such was indubitably within § 266. Compare *Railroad Com-*

mission v. Rowan & Nichols Oil Co. and Railroad Commission v. Humble Oil & Refining Co., Nos. 218 and 37, this Term.

Had a timely appeal been taken to the circuit court of appeals the decree below could have been reviewed there, though rendered by three judges. *Healy v. Ratta*, 289 U. S. 701, 67 F. (2d) 554, 292 U. S. 263. While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of § 266 by an order framed to save appellants their proper remedies. *Oklahoma Gas Co. v. Packing Co.*, 292 U. S. 386, 392. We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.

Decree vacated.

A true copy.

Test:

Clerk, Supreme Court, U. S.